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Federal Communications Commission Record

Volume 9
Issue 26

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... iv

Table of Rulemakings..... v

Table of Localities..... vi

Table by Subject Matter..... vii

Table by Statutory and Rule Provisions..... ix

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 7765

Cumulated Index to Volume 9..... 8263

Instructions for Use..... 8264

Table of Cases..... 8265

Table of FCC and Delegated Authority Numbers..... 8299

Table of Docket Numbers..... 8315

Table of Rulemaking Numbers..... 8321

Table of Localities..... 8325

Subject Index..... 8333

Table of Cases
Volume 9
Issue 26

Case Name	Page
Adelphia Cable Partners, L.P.	7781
Amendment of Part 36 - Establishment of Joint Board	7962
Amendment of Part 36 - Establishment of Joint Board	7827
American Telephone and Telegraph Company	7844
Ameritech Operating Companies	7916
Annual Access Tariff Review Plans	7905
Bacone College	7931
Beehive Telephone, Inc.	7914
Bell Atlantic Telephone Companies	7868
Brookridge Cable Special Purpose Partnership II	7825
Brookridge Cable Special Purpose Partnership II	7828
Brookridge Cable Special Purpose Partnership II	7917
C-TEC Cable Systems of Michigan, Inc.	7830
Cable TV Act of 1992 - Broadcast Signal Carriage Issues (ERRATUM)	7882
Call U.S., Inc.	7853
Canistota Public Schools	7929
Capitol City Broadcasting Company	7861
Charles Schwab & Co., Inc. et al.	7987
Clinton Cable Limited Partnership	7795
Codification of the Commission's Political Programming Policies	7919
Comcast Cablevision of Tallahassee, Florida	7773
Detroit Independent School District	7883
Digesu, Frank, Sr.	7866
Emerging Telecommunications Technologies	7797
Ex Parte Procedures in Certain Cable Rate Proceedings	7812
Fouce Amusement Enterprises, Inc.	7935
Friendly Bible Church, Inc.	7907
GTE Midwest Incorporated	7789
GTE Service Corporation	7823
GTE Southwest Incorporated	7785
Gateway Christian School	7933
George West Independent School District	7925
Global Telecommunications, Inc.	7837
Greater Dayton Public Television	7940
Harlem Consolidated School District #122	7927
Implementation of Sections 3(n) and 332	7988
Independent Data Communications Manufacturers Association, Inc.	7822
John Van De Kamp, Pete Wilson, Dan Lungren, Arlo Smith, et al.	7956
K&S International Communications, Inc.	7846
Kingsville Independent School District	7923
Kralowec Children's Family Trust	7908
L. Douglas Wilder and Marshall Coleman	7951
Low Earth Orbit Satellites Applications	7921
MCI Telecommunications Corp.	7912
Mauivision K59E1	7910
Modifications to the Annual Access Tariff Review Plans	7905
Montrose School District #43-2	7938
Moran Communications, Inc.	7911
Multipoint Distribution Service Applications	7886
NYNEX Telphone Companies	7832
New Personal Communications Services	7805

Case Name	Page
Ouachita Academy of Arts and Science	7903
Pacific Bell	7765
Personal Communications Services	7771
Prime Time Access Rule	7824
Roxton Independent School District	7900
Rural California Broadcasting Corporation	7936
Smith, Loretta	7814
Southern New England Telephone Company	7872
Table of Allotments, FM, Addison, AL	7950
Table of Allotments, FM, Bells, TX	7943
Table of Allotments, FM, Buffalo and Lamar, MO	7945
Table of Allotments, FM, Calabash and Tabor City, NC	7857
Table of Allotments, FM, Dickeyville, WI	7816
Table of Allotments, FM, Houston, AK	7859
Table of Allotments, FM, Madrid, IA	7949
Table of Allotments, FM, Pago Pago, American Samoa	7821
Table of Allotments, FM, Sageville, IA	7854
Table of Allotments, FM, Vail, CO	7820
Table of Allotments, FM, Van Wert and Richwood, OH	7947
Table of Allotments, TV, Kailua, HI	7819
Table of Allotments, TV, Kaneohe, HI(ERRATUM)	7856
Table of Allotments, TV, Waimanalo, HI	7818
The Ameritech Operating Companies	7873
US Sprint Communications Company Limited Partnership	7767
US West Communications	7834
US West Communications, Inc.	7852
US West, Inc., and US West Communications, Inc.	7906
United Utilities, Inc.	7793
Warner Cable Communications	7777

Table of Cases by Delegated Authority and FCC Number

Volume 9
Issue 26

Delegated Authority or FCC Number	Page
DA 94 -1176	7912
DA 94 -1177	7914
DA 94 -1240	7852
DA 94 -1241	7987
DA 94 -1273	7771
DA 94 -1275	7773
DA 94 -1276	7777
DA 94 -1277	7781
DA 94 -1294	7905
DA 94 -1298	7882
DA 94 -1323	7921
DA 94 -1324	7767
DA 94 -1330	7832
DA 94 -1333	7834
DA 94 -1348	7823
DA 94 -1350	7873
DA 94 -1364	7962
DA 94 -1365	7785
DA 94 -1366	7789
DA 94 -1372	7793
DA 94 -1375	7827
DA 94 -1380	7830
DA 94 -1382	7795
DA 94 -1388	7916
DA 94 -1389	7765
DA 94 -1391	7828
DA 94 -1392	7825
DA 94 -1393	7917
DA 94 -1397	7868
DA 94 -1398	7816
DA 94 -1399	7818
DA 94 -1400	7819
DA 94 -1401	7820
DA 94 -1402	7821
DA 94 -1405	7814
DA 94 -1407	7859
DA 94 -1408	7824
DA 94 -1410	7853
DA 94 -1411	7822
DA 94 -1412	7837
DA 94 -1413	7846
DA 94 -1414	7844
DA 94 -1415	7856
DA 94 -1416	7854
DA 94 -1417	7857
DA 94 -1419	7907
DA 94 -1420	7872
DA 94 -1445	7908
DA 94 -1446	7910
DA 94 -1452	7935
DA 94 -1453	7911
DA 94 -1460	7936
DA 94 -1475	7950
DA 94 -1476	7949
DA 94 -1477	7947
DA 94 -1483	7951
DA 94 -1484	7956
DA 94 -1491	7943
DA 94 -1492	7945
DA 94 -1497	7940
FCC 94 - 212	7988
FCC 94 - 232	7812
FCC 94 - 279	7919
FCC 94 - 291	7886
FCC 94 - 300	7903
FCC 94 - 303	7797
FCC 94 - 304	7805
FCC 94 - 305	7900
FCC 94 - 306	7883
FCC 94 - 307	7923
FCC 94 - 308	7925
FCC 94 - 309	7929
FCC 94 - 310	7931
FCC 94 - 311	7938
FCC 94 - 312	7927
FCC 94 - 313	7933
FCC 94 - 316	7906
FCC 94R - 19	7861
FCC 94R - 20	7866

Federal Communications Commission Record

Table of Cases by Docket Number
Volume 9
Issue 26

Docket Number				Page
CC	Dkt.No.80	-	286	7962
CC	Dkt.No.80	-	286	7827
ET	Dkt.No.92	-	9	7797
GEN	Dkt.No.90	-	314	7805
GN	Dkt.No.93	-	252	7988
MM	Dkt.No.90	-	150	7866
MM	Dkt.No.90	-	352	7861
MM	Dkt.No.91	-	168	7919
MM	Dkt.No.92	-	259	7882
MM	Dkt.No.93	-	249	7857
MM	Dkt.No.93	-	272	7949
MM	Dkt.No.94	-	14	7947
MM	Dkt.No.94	-	26	7821
MM	Dkt.No.94	-	30	7856
MM	Dkt.No.94	-	52	7818
MM	Dkt.No.94	-	53	7819
MM	Dkt.No.94	-	55	7820
MM	Dkt.No.94	-	98	7950
MM	Dkt.No.94	-	123	7824
MM	Dkt.No.94	-	144	7816
MM	Dkt.No.94	-	145	7854
MM	Dkt.No.94	-	146	7859
MM	Dkt.No.94	-	151	7945
MM	Dkt.No.94	-	152	7943
PR	Dkt.No.89	-	553	7988
PR	Dkt.No.93	-	144	7988

Table of Cases by Rulemaking Number
Volume 9
Issue 26

Rulemaking Number	Page
RM - 7981	7797
RM - 8004	7797
RM - 8330	7857
RM - 8361	7949
RM - 8426	7947
RM - 8433	7950
RM - 8454	7820
RM - 8457	7856
RM - 8471	7947
RM - 8473	7818
RM - 8475	7819
RM - 8554	7816
RM - 8555	7945
RM - 8556	7854
RM - 8557	7859
RM - 8565	7943

Table of Cases by City
Volume 9
Issue 26

City/ State	Page
Addison, AL	7950
Argyle, TX	7825
Basking Ridge, NJ	7912
Bells, TX	7943
Benavides, TX	7925
Buffalo, MO	7945
Calabash, NC	7857
Carlsbad, NM	7933
Colman, SD	7929
Dickeyville, WI	7816
Falfurrias, TX	7923
George West, TX	7925
Houston, AK	7859
Kailua, HI	7819
Kaneohe, HI	7856
Kenefic, OK	7883
Lamar, MO	7945
Longview, TX	7861
Madrid, IA	7949
Meridianville, AL	7866
Milwaukee, WI	7777
Montrose, SD	7938
Montrose, SD	7929
Mt. Pleasant, TX	7883
Paris, TX	7883
Petersburg, VA	7951
Rayville, LA	7903
Richwood, OH	7947
Rockford, IL	7927
Sacramento, CA	7956
Sageville, IA	7854
South Dade County, FL	7781
Sumner, TX	7900
Sumner, TX	7883
Tabor City, NC	7857
Tallahasse, FL	7773
Texarkana, TX	7883
Vail, CO	7820
Van Wert, OH	7947
Waimanalo, HI	7818
Warner, OK	7931
Washington, DC	7814
Washington, DC	7912

Subject	Page
Access Charges	
General information	
Common Line element, end user charges include	7868
Broadcast Radio Services - General Rules	
Applications	
Facilities, applications to modify/change control of unbuilt	7866
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	7816, 7820, 7821, 7854, 7859, 7857, 7950, 7947
Broadcasting - TV Stations	
Allocations/assignments/licenses	
Table of assignments	7818, 7819, 7856
Cable Television Service	
Markets and services	
Cable signals in major markets, provisions	7907, 7908, 7910, 7911, 7935, 7936, 7940
Expiration of mandatory carriage provisions	7882
Rules	
Waiver by Commission of any provision	7907
Carriers: Service Altered	
Extensions and supplements	
Applications, contents of	7846, 7844
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	7987, 7767, 7914, 7912
Common Carriers: Miscellaneous Rules	
Allocation of costs to regulated or non-regulated costs	7962
Communications Act of 1934	
Common Carriers	
Extension of lines, certificate for	7846, 7844
Domestic Public Fixed Radio Services	
Applications and licenses, filing requirements	
Defective applications	7886
Applications and licenses, processing	
Mutually exclusive applications	7886
Multipoint distribution service	
Frequency interference	7886

Subject	Page
Practice and Procedure	
Common carriers: complaints, formal	
Issues and facts, statement of	7767
Ex parte presentations, general information	
Purpose: to specify standards of conduct and procedure	7812
Information, general	
Rules, suspension, amendment, waiver	7868, 7852
Pleadings, briefs	
Extension of time, motions for	7827
Reconsideration/review of Commission action	
Reconsideration of a final FCC action	7830, 7825, 7828, 7886, 7917
Special Broadcast Services	
Instructional TV fixed service	
Application, processing of	7923, 7925, 7933
Applications, selective procedures	7903, 7900, 7883, 7906, 7938, 7923, 7925, 7929, 7931, 7927, 7933
Licensing requirements	7903, 7900, 7883, 7906, 7938, 7923, 7925, 7929, 7931, 7927, 7933
Services permissible	7903, 7900, 7883, 7927

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.290 Delegated Authority	7905
000.291 Delegated Authority	7823
000.291 Delegated Authority	7916
000.315(b) Facilities for Candidates for Public Office	7919
001.106 Petitions for Reconsideration	7825
001.106 Petitions for Reconsideration	7828
001.106 Petitions for Reconsideration	7830
001.106 Petitions for Reconsideration	7886
001.106 Petitions for Reconsideration	7917
001.1200 Ex parte procedures for cable television rate regulation	7812
001.2105 Prohibition of Collusion	7912
001.300 Petition for Waiver	7852
001.300 Suspension, Amendment, or Waiver of Rules	7868
001.402 Pioneer's Preference	7805
001.460 Motions for Extension of Time	7827
001.711 Formal or informal complaints	7853
003.601 General	7827
021.190 Waiver of Rules	7886
021.200 Defective Applications	7886
021.310 Mutually Exclusive Applications	7886
021.500 Transition of the 2.11-2.13 and 2.16-2.18 GHz Bands	7797
021.901 Frequencies	7886
021.902 Frequency Interference	7886
021.914 Mutually Exclusive MDS Applications	7886
022.500 Transition of the 2.11-2.13 and 2.16-2.18 GHz Bands	7797
036.125 Local Switching Equipment Category 3	7962
036.125 Local Switching Equipment--Category 3	7827
036.601 General	7962
036.711 Life Line Connection Assistance	7962
036.711 Lifeline Connection Assistance	7827
061.410(c) Price Cap Rules	7852
063.001 Contents of Applications	7837
063.001 Contents of Applications	7844
063.001 Contents of Applications	7846
064.1001 International Settlements Policy & Waivers	7844
064.1389 (b) (4)	7765
064.901 Allocation of Costs	7962
069.400(b) Filing of Access Service Tariffs	7868
073.1920 Personal Attacks	7814
073.1942 Candidate Rates	7919
073.1942 Candidate rates	7951
073.1942 Candidate rates	7956
073.202 FM Table of Allotments	7816
073.202 FM Table of Allotments	7820
073.202 FM Table of Allotments	7821
073.202 FM Table of Allotments	7859
073.3525 Settlement Agreement, Approved	7866
073.606 TV Table of Allotments	7818
073.606 TV Table of Allotments	7819
073.658 Oper. of TV aural and visual transmitters	7824

074.911 Processing of ITFS station applications 7923
074.911 Processing of ITFS station applications 7925
074.911 Processing of ITFS station applications 7933
074.913 Selection procedure for mutually exclusive ITFS applica 7883
074.913 Selection procedure for mutually exclusive ITFS applica 7900
074.913 Selection procedure for mutually exclusive ITFS applica 7903
074.913 Selection Procedure For Mutually Exclusive ITFS applica 7923
074.913 Selection Procedure For Mutually Exclusive ITFS applica 7925
074.913 Selection Procedure for Mutually Exclusive ITFS applica 7927
074.913 Selection Procedure For Mutually Exclusive ITFS applica 7929
074.913 Selection Procedure For Mutually Exclusive ITFS Applica 7931
074.913 Selection Procedure For Mutually Exclusive ITFS applica 7933
074.913 Selection Procedure For Mutually Exclusive ITFS applica 7938
074.931 Purpose and Permissible service 7883
074.931 Purpose and Permissible service 7900
074.931 Purpose and permissible service 7903
074.931 Purpose and permissible service 7927
074.932 Eligibility and Licensing Requirement 7923
074.932 Eligibility and Licensing Requirement 7925
074.932 Eligibility and Licensing Requirement 7929
074.932 Eligibility and Licensing Requirement 7931
074.932 Eligibility and licensing requirements 7883
074.932 Eligibility and licensing requirements 7900
074.932 Eligibility and licensing requirements 7903
074.932 Eligibility and licensing requirements 7927
074.932 Eligibility and Licensing Requirements 7933
074.932 Eligibility and Licensing Requirements 7938
076.610 Disputes concerning carriage 7907
076.610 Disputes concerning carriage 7908
076.610 Disputes concerning carriage 7910
076.610 Disputes concerning carriage 7911
076.610 Disputes concerning carriage 7935
076.610 Disputes concerning carriage 7940
076.610(b) Complaints regarding qualified NCE stations 7936
076.640 Retransmission consent 7882
076.700 Special relief and must-carry complaint procedures 7907
076.905 Standards for Effective Competition 7795
076.906 Presumption of No Effective Competition 7795
076.906 Presumption of no effective competition 7825
076.906 Presumption of no effective competition 7828
076.906 Presumption of no effective competition 7830
076.906 Presumption of no effective competition 7917
076.910 Franchising Authority Certification 7795
076.910 Franchising authority certification 7825
076.910 Franchising authority certification 7828
076.910 Franchising authority certification 7830
076.910 Franchising authority certification 7917
076.911 Petition for Reconsideration 7795
076.911 Petition for reconsideration of certification 7825
076.911 Petition for reconsideration of certification 7828
076.911 Petition for reconsideration of certification 7830
076.911 Petition for reconsideration of certification 7917
076.914 Revocation of Certification 7795
076.922 Rates for Cable Programming Service tiers 7777

076.922 Rates for Cable Programming Service tiers 7781
076.922 Rates for the basic service tier and cable programming service tier 7812
076.923 Rates for equipment and installation used to receive the basic service tier 7812
094.590 Transition of the Private 1.85-2.20 GHz Bands 7797
200.214 Extension of Lines 7837
300.214 Extension of Lines 7844
300.214 Extension of Lines 7846
300.534 Carriage of local commercial television signals 7908
300.534 Carriage of local commercial television signals 7910
300.534 Carriage of local commercial television signals 7911
300.534 Carriage of local commercial television signals 7935
300.534 Carriage of local commercial television signals 7940
300.535 Carriage of noncommercial educational television 7936
300.623 Regulation of Rates 7825
300.623 Regulation of Rates 7828
300.623 Regulation of Rates 7830
300.623 Regulation of Rates 7917
47 C.F.R. 1.722, 0.291 Damages, Authority delegated 7767
47 C.F.R. Section 0.291 Delegated Authority 7832
47 CFR §1.2 7822
500.3170 Financial Qualifications 7861
600.623 Regulation of Rates 7795
73.202 FM Table of Allotments 7945
73.202 FM Table of Allotments 7947
73.202 FM Table of Allotments 7949
73.202 FM Table of Allotments 7950
76.922 Rates for Cable Programming Service tiers 7773
AAD 94-108;DA 94-1365 7785
AAD 94-58; DA 94-1372 7793
AAD 94-95;DA 94- 7789
Joint Petition for Waiver of Defin. of Study Area Waiver contained Part 36 7785
Joint Petition for Waiver of Defin. of Study Area Waiver contained Part 36 7789
NPRM, FM B/C STAS. (Bells, TX), DA 94-1491 7943
Part 36 Appendix-Glossary Study Area Defin. 7852
Part 36, Subpart H, Appendix-Glossary 7793
Petition for Waiver Defin. "Study Area" 7793
Petition for Waiver of Sects. 61.41(c) 7785
Petition for Waiver of Sects. 61.41(c) 7789

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell Petition for Waiver to Reallocate Nonregulated Power and Common Equipment Investment — AAD 94-21

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1994; Released: December 13, 1994

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On December 30, 1993, Pacific Bell ("Pacific") filed a petition for waiver of Section 64.901(b)(4) of the Commission's rules.[1] In its petition, Pacific requests permission to reallocate power and common equipment,[2] assigned to a common cost pool,[3] in Account 2212, Digital electronic switching, from nonregulated use to regulated use. MCI Telecommunications Corporation ("MCI") filed an opposition, and Pacific filed a reply.[4] As discussed below, we deny Pacific's request to reallocate this power and common investment from nonregulated to regulated service.

2. In the *Joint Cost Orders*,[5] the Commission specified that, absent a waiver, investment allocated to nonregulated use may not be reallocated to regulated use. This policy is intended to insure that investment risks of nonregulated ventures are not shifted to a carrier's regulated operations. The Commission stated, however, that it would permit such reallocation if a carrier submits a convincing case showing that (a) its regulated activities require the use of the plant capacity allocated to nonregulated activities and (b) the carrier cannot obtain the needed capacity elsewhere at a lower cost.[6] The joint cost rules are contained in Section 64.901, Allocation of costs.[7] Section 64.901(b)(4), of which Pacific seeks a waiver, deals specifically with the allocation of central office equipment and outside plant investment costs.

II. PLEADINGS

3. Prior to January 1, 1993, Pacific provided voice messaging services to end users. The equipment used to switch these services was recorded in Account 2212, Digital electronic switching, and because voice messaging is not regulated by the Commission, the equipment was directly assigned to nonregulated activities. Account 2212 also included central office power and common equipment that supported Pacific's digital electronic switching equipment, including the power and common equipment used to provide voice messaging services. Pacific allocated $4,331,000 of that power and common equipment to the nonregulated voice messaging services. On January 1, 1993, Pacific transferred the voice messaging services to Pacific Bell Information Services ("PBIS"), a new nonregulated subsidiary, and transferred the directly assigned switching investment related to voice messaging services from Pacific's accounts to the books of the new subsidiary.[8] Pacific, however, did not transfer the $4,331,000 of power and common equipment related to voice messaging.[9] Pacific requests permission to reallocate this power and common equipment to regulated activities.[10]

4. Pacific explains that PBIS rents space in Pacific's central office to operate the voice messaging equipment. Pacific claims that it bills PBIS for the services included in the space rental agreement at fully distributed cost ("FDC") including, among other things, a charge for the use of Pacific's power and common equipment. Pacific claims that, in addition to allocating the $4,331,000 of power and common equipment to nonregulated activities for voice messaging services, it excludes power and common investment from regulated costs under the FDC allocation related to the space rental agreement. Pacific states that this double counting of the same investment is inappropriate and unfair to shareholders. Pacific claims that this inequity can be remedied by granting its petition.[11]

5. In addition, Pacific contends that the Commission's rules regarding the reallocation of nonregulated network plant investment to regulated activities do not apply. Pacific states that these rules apply only to network plant investment dedicated to nonregulated activities, and for which net book value, fair market value, and replacement cost can be identified. In this case, Pacific states that the power and common equipment supports both regulated and nonregulated activities, and, therefore, that it cannot assign net book value, fair market value, or replacement cost to a portion of the investment.[12]

6. MCI opposes Pacific's petition and contends that Pacific does not meet the Commission's requirements for a waiver. MCI states that the Commission may grant a waiver

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[1] Pacific Petition at 1.

[2] Power and common equipment consists of batteries, emergency generators, framework, and other equipment that supports central office equipment.

[3] A common cost pool is a collection of homogeneous costs placed in categories designed to facilitate the allocation of such costs between regulated and nonregulated services.

[4] In order to analyze Pacific's Petition for Waiver, the Commission issued a data request on September 6, 1994. Pacific responded on September 30, 1994, and filed *ex parte* Letters on October 6, 1994, October 14, 1994, and October 21, 1994.

[5] *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Report and Order*, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *recon.* 2 FCC Rcd 6283 (1987) (*Recon. Order*), *further recon.*, 3 FCC Rcd 6701 (1988) (*Further Recon. Order*), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[6] *Further Recon. Order*, 3 FCC Rcd at 6705, para. 29; *Recon. Order*, 2 FCC Rcd at 6291, para. 66; *Joint Cost Order*, 2 FCC Rcd at 1320, para. 169, & 1353, n.284.

[7] 47 C.F.R. §64.901.

[8] Pacific Petition at 3.

[9] *Id.* at 3 and 4. Pacific claims that power and common equipment cannot be specifically identified as supporting nonregulated or regulated activities, therefore, Pacific did not transfer this equipment to PBIS.

[10] *Id.* at 1 and 4.

[11] *Id.* at 6.

[12] *Id.* at 5.

only when a carrier demonstrates special circumstances. MCI claims that because Pacific is unable to assign a net book value, fair market value, or replacement cost to the power and common equipment, it does not meet the Commission's waiver requirements.[13]

III. DISCUSSION

7. Waiver of our rules is appropriate only if special circumstances warrant a deviation from the general rule[14] and such deviation will serve the public interest.[15] Generally, a waiver request must be consistent with the principles underlying the rule for which a waiver is requested. The Commission will grant a waiver to reallocate investment from nonregulated to regulated activities only if the carrier has made a showing that (a) there is a need for the equipment in regulated service and (b) the carrier cannot obtain this equipment at a lower cost elsewhere.[16] For the reasons set forth below, we find that Pacific has not made a case that warrants a waiver to reallocate power and common investment in Account 2212 from nonregulated to regulated activities.

8. Pacific has not demonstrated that the waiver it requested would be in the public interest. Pacific used nonregulated switching equipment and power and common equipment in its central offices to provide a nonregulated telephone service. It subsequently decided to provide this service through a nonregulated subsidiary. In recognition of this change, Pacific transferred the switching equipment related to this service from the telephone company books to the subsidiary's books, but it did not transfer the related power and common equipment. From an operational standpoint, nothing else changed. The same nonregulated service continues to be provided with the same equipment in the same location. Pacific, however, seeks permission to transfer the cost of the power and common equipment associated with this service from nonregulated to regulated activities.

9. Because the power and common equipment is still being used to support the nonregulated voice messaging activity, Pacific clearly cannot demonstrate that this same capacity is needed to support Pacific's regulated activity. Furthermore, Pacific did not provide any evidence to show that it cannot obtain the needed capacity elsewhere at a lower cost. Therefore, we deny Pacific's request for waiver.

10. We agree with Pacific that the power and common investment related to the nonregulated voice messaging should not be removed from regulated operations twice. Pacific has not shown, however, that it has, in fact, removed these costs from its regulated activities twice. In any case, the remedy for removing costs from regulated operations twice would not be a waiver of the rule that prohibits the reallocation of nonregulated costs to regulated activities. Section 64.901(b)(4) requires that Pacific allocate at least $4,331,000 of power and common investment to nonregulated voice messaging. We know of nothing in the rules, however, that causes the power and common investment assigned to this nonregulated activity to be removed from regulated costs twice.

IV. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201-205, 215, and 218-220 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201-205, 215, and 218-220 and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that Pacific Bell's petition for waiver of Section 64.901(b)(4) of the Commission's rules to reallocate power and common investment IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

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[13] MCI Petition at 1, 2, and 4.

[14] *Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[15] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[16] *See supra*, note 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

US SPRINT
COMMUNICATIONS COMPANY
LIMITED PARTNERSHIP,
Complainant,

v. File No. E-91-43

PACIFIC BELL
TELEPHONE COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: November 18, 1994; Released: December 13, 1994

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. US Sprint Communications Company, Limited Partnership (Sprint), filed the above-captioned formal complaint on January 22, 1991 against Pacific Bell Telephone Company (PacBell). Sprint alleged that PacBell unlawfully imposed equal access recovery charges (EARCs) on 800/900 access service that was provided from non-equal access end offices. Sprint seeks a Commission order that PacBell cease and desist from such practices and pay monetary damages to Sprint. For the reasons and to the extent discussed below, we grant Sprint's complaint in part.

II. BACKGROUND

2. On January 18, 1989, the Commission amended Part 69 of its rules to give local exchange carriers (LECs) the option of assessing EARCs to recover the cost of converting end offices to equal access.[1] This rule, 47 C.F.R. § 69.107, enabled LECs, such as PacBell, to charge interexchange carriers (IXCs), including Sprint, a flat monthly fee on Feature Group D (FGD) trunks or on all presubscribed equal access lines. FGD is generally characterized by a level of service that provides all IXCs with equal access to the LECs' networks. The Commission stated that the EARC would not apply to Feature Group A (FGA) lines or Feature Group B (FGB) trunks, even from converted end offices, because these services do not provide equal access to LEC networks.[2]

3. Pursuant to Section 6.7.16 of its tariff, PacBell assesses an EARC on its customers' FGD trunks to recover the costs associated with equal access.[3] According to PacBell's tariff, FGD is available at designated electronic end office switches[4] and has several associated options, including automatic number identification (ANI).[5] PacBell's tariff also states that when 800/900 access service is provided from converted end offices (equal access offices), PacBell will provide ANI, but it will not do so from non-converted end offices.[6]

4. Sprint has three contentions. First, Sprint asserts that PacBell's practice of collecting EARCs for 800/900 access services provided via non-converted end offices, while failing to provide essential features and functionalities of FGD including ANI, constitutes an unjust and unreasonable practice under Section 201(b) of the Communications Act (Act), 47 U.S.C. § 201(b). Next, Sprint contends that PacBell's actions are unreasonably discriminatory under Section 202(a) of the Act to the extent that PacBell does not charge AT&T EARCs on trunks carrying AT&T's 800/900 traffic that originates at PacBell's non-converted end offices. Finally, Sprint argues that PacBell's practice of assessing EARCs on non-equal access trunks is unlawful under Section 203(c) of the Act because it is not authorized by PacBell's tariff. We address Sprint's claims seriatim.

III. CONTENTIONS AND DISCUSSION

A. Section 201(b) Claim

Contentions of the Parties

5. Sprint alleges that PacBell imposes EARCs on all trunks that transport Sprint's 800/900 traffic, even for traffic originating at PacBell's non-converted end offices. Sprint contends that because PacBell does not provide ANI for the 800/900 service provided fromits non-converted end offices,[7] the service cannot be considered equal access (FGD), but simply is FGB. Sprint claims that by labelling this 800/900 service and the associated trunks as FGD, PacBell recovers equal access costs from users of non-equal access services. Sprint concludes that PacBell's practice is unjust and unreasonable, and violates Section 201(b).

6. PacBell denies that its imposition of EARCs on Sprint's 800/900 trunks from non-converted end offices violates Section 201(b), claiming instead that its practice fully complies with the Commission's rules. PacBell states that 800/900 access service is available to Sprint only via FGD, as stated in its tariffs. Therefore, PacBell explains, the trunks carrying this traffic are FGD trunks, regardless of whether the traffic originates at converted or non-converted end offices. PacBell also denies that ANI is a neces-

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[1] *MTS and WATS Market Structure*, 4 FCC Rcd 2104 (1989) (*EARC Order*). The rules were amended further in June 1991, but these revisions do not affect this proceeding. *See* Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524 (1991).

[2] The Commission reasoned that customers who do not use equal access should not have to pay for it. *EARC Order*, 4 FCC Rcd at 2107.

[3] Pacific Bell Tariff F.C.C. No. 128, § 6.7.16. Hereinafter, all references to PacBell's tariff will refer to Pacific Bell Tariff F.C.C. No. 128, as in effect at the time of the filing of this complaint.

[4] PacBell Tariff § 6.2.4(A)(1).

[5] PacBell Tariff § 6.2.4(B).

[6] PacBell Tariff § 6.2.6.

[7] Although Sprint's complaint focuses on ANI, it also claims that PacBell fails to provide "the features and functionalities of equal access" in general. Complaint at ¶15.

sary feature of FGD service, and claims that ANI is an option available only when FGD is provided from converted end offices.

7. PacBell also denies Sprint's assertion that the service at issue here is really FGB. PacBell claims that the 950-0/1XXX dialing pattern, which is an integral feature of originating FGB, is not present in Sprint's 800 or 900 network configuration. Therefore, argues PacBell, FGB does not describe the 800/900 access provided to Sprint. PacBell asserts that the 800/900 service it provides from non-converted end offices is "equivalent to equal access for the end user,"[8] because the customer simply dials 1 plus the 800 or 900 number.

Discussion

8. In its *EARC Order,* the Commission stated that the "[u]se of the new [EARC] rate element will be restricted to recovery of [equal access] costs as defined for separations purposes."[9] Equal access costs for separations purposes were defined to include "only initial incremental presubscription costs associated with conversion of end offices to equal access."[10] The Commission permitted LECs to recover these costs by applying a charge, the EARC, to FGD trunks, which are associated with equal access service.[11] A LEC that applies the EARC to trunks serving non-converted end offices, as does PacBell, thwarts the Commission's regulatory scheme by collecting an EARC where no end office equal access conversion costs have been incurred.[12]

9. Although the parties rely on arguments about the availability of ANI and end user dialing patterns to address the issue of whether FGD is being provided to Sprint, we believe that the focus should be, as the Commission has previously established, on whether the end offices in question have been converted to equal access. As noted above, the Commission, in its *EARC Order,* defined the EARC to be a charge to recover end office equal access conversion costs. Where no such conversion costs have been incurred, it is unreasonable to assess an EARC.

10. We conclude that PacBell's practice of collecting EARCs on trunks carrying traffic that originates at non-converted end offices contravenes the Commission's *EARC Order* and is therefore unjust and unreasonable, in violation of Section 201(b).

B. Section 202(a) Claim

Contentions of the Parties

11. Sprint asserts that PacBell has engaged in unreasonable discrimination because PacBell levies EARCs on the purported FGD trunks used by Sprint, but does not impose those charges on FGC trunks used by AT&T, even though the 800/900 traffic for both IXCs originates at PacBell's non-converted end offices.[13] This, claims Sprint, is discriminatory and preferential treatment, in violation of Section 202(a).

12. PacBell admits that it does not charge EARCs on the FGC trunks used by AT&T to carry its 800/900 traffic, but contends that this action is entirely lawful. Specifically, PacBell contends that Section 69.107 of the Commission's rules does not permit the levying of the EARC on FGC trunks. Thus, PacBell denies Sprint's charge of unreasonable discrimination and violation of Section 202(a).

Discussion

13. Applicable judicial precedents establish a three-prong test for determining whether a Section 202(a) violation has occurred. The first prong requires the Commission to determine whether the services at issue are like one another. If so, the Commission must, under the second prong, determine whether there is disparate pricing or treatment between the like services. Third, if disparate pricing or treatment is found to exist, the Commission must decide whether the disparity is justified and, therefore, not unreasonable.[14] In the context of a Section 208 complaint proceeding, the complainant has the evidentiary burden of establishing that the services are like and that the discrimination between them is unreasonable.[15]

14. We find that Sprint has not met its burden of proof that the 800/900 services provided to Sprint and AT&T at PacBell's non-converted end offices are like services. Sprint has presented no evidence that the service it receives is like that provided to AT&T. In fact, Sprint instead highlights the differences between the services, including the different routing topologies used by Sprint and AT&T, and the different levels of functionality PacBell provides to Sprint and AT&T at its non-converted end offices.[16] While it is true that the trunks of both AT&T and Sprint carry 800/900 traffic that originates from PacBell's non-converted end offices, Sprint does not argue that this fact creates like services. Although it may appear that Sprint is the subject of unreasonable discrimination because it is paying an EARC that is not levied on AT&T, the record presents no evidence that the imposition of this charge is the result of unreasonable discrimination. Rather, as discussed in paragraphs 8-10 above, PacBell's imposition of an EARC on

[8] Answer at ¶15.
[9] *EARC Order,* 4 FCC Rcd at 2104.
[10] *Id.* at n.9. The cost of tandem switches, *inter alia,* was specifically excluded.
[11] We note that PacBell's tariff associates FGD with equal access end offices. *See* PacBell Tariff § 6.7.1(D)(1).
[12] The Bureau has granted waivers to LECs permitting traffic originating at non-converted end offices to be routed over FGD trunks. These waivers were granted on the express condition that this routing arrangement would be provided only at the option of the IXC customer and that the pre-existing routing options using other feature groups would continue to be offered. *See, e.g.,* Southwestern Bell Telephone Company Petition for Waiver, 2 FCC Rcd 3919 (Com. Car. Bur. 1987). Although PacBell was granted such a waiver, the waiver order did not permit PacBell to require IXCs to use that routing option. *See* PacBell Petition for Waiver, 2 FCC Rcd 4423 (Com. Car. Bur. 1987).
[13] FGC is the service provided to AT&T at non-converted end offices. *See* PacBell Tariff § 6.2.3(A).
[14] MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990).
[15] Ad Hoc Telecommunications Users Commission v. FCC, 680 F.2d 790, 795 (D.C. Cir 1982).
[16] *See, e.g.,* Complaint at ¶ ¶ 15, 20.

Sprint without providing the attendant FGD service is an unreasonable practice that violates Section 201(b) of the Act. Yet, absent a showing of like services, we find that Sprint has not demonstrated that PacBell's practice constituted unreasonable discrimination within the meaning of Section 202(a).

C. Section 203(c) Claim

Contentions of the Parties

15. Sprint argues that PacBell's tariff does not authorize PacBell to apply EARCs to the trunks that carry Sprint's 800/900 traffic that originates from PacBell's non-converted end offices. According to Sprint, PacBell's tariff states that the EARC is intended solely to recover equal access costs, including the expense of equipping switches to handle FGD.[17] Sprint argues that because non-converted end offices do not provide equal access, PacBell is violating its tariff by applying EARCs to the trunks serving those offices.[18] Thus, Sprint reasons that because PacBell does not apply the EARC in the manner authorized by PacBell's tariff, PacBell is in violation of Section 203(c).[19]

16. PacBell denies that its practice of applying EARCs to Sprint's 800/900 trunks that serve non-converted end offices violates its tariffs. PacBell argues that it is not violating its tariff because, even though Sprint's traffic originates from non-converted end offices, Sprint is getting "equal type access" because end users served by these non-converted end offices (just like end users served by equal access end offices) do not have to dial an access code to place a Sprint 800/900 call.[20]

Discussion

17. Section 203(c) requires, *inter alia*, that all common carriers publicly file the rates and practices applicable to each of their services. This statutory provision also requires that carrier charges and practices be no more or less than the rate reflected in the tariff. Sprint's Section 203(a) contentions focus on whether PacBell's practice of imposing the EARC on its 800/900 service is consistent with its tariff. After a review of numerous PacBell tariff provisions, we agree with Sprint that PacBell is improperly applying its tariff in violation of Section 203(c).

18. PacBell's tariff indicates that "the [EARC] is a charge to recover those costs that [PacBell] incurs solely in connection with equal access. Equal access costs represent the cost of equipping switching machines to handle FGD.[21] Therefore, if the 800/900 service Sprint receives at PacBell's non-converted end offices is not FGD, PacBell has applied the EARC inconsistently with its tariff and violated Section 203(c).

19. The 800/900 section of PacBell's tariff states that 800/900 service provided from a non-converted end office will be provided in accordance with the "technical characteristics" of FGC or FGD.[22] In another part of PacBell's tariff, FGD is described as trunk side access to PacBell's electronic end office switches that allows for the use of 10XXX access codes and uses multifrequency address signalling.[23] PacBell's FGD description also includes ANI as a common optional feature.[24]

20. While the record does not detail all of the technical specifications of the 800/900 service provided to Sprint, it is clear that neither 10XXX access codes nor ANI, though optional, is available to Sprint at the end offices at issue. We are unpersuaded by PacBell's claim that the service is FGD because it seems like equal access to the end user. PacBell's tariff defines FGD in terms of functionalities offered to IXCs, not end users.[25] In addition, we find that there are other factors that indicate that PacBell does not properly apply its tariff with respect to Sprint's 800/900 service.

21. First, PacBell acknowledges that it charges Sprint nonpremium access charges for this purported FGD service,[26] even though its tariff states that premium access charges apply to FGD service.[27] The tariff also states that non-premium rates apply to 800 service from end offices "not equipped with equal access."[28] Thus, it appears that PacBell considers the service in question to be something other than FGD for purposes of access charges. We fail to understand how a service can be FGD for purposes of the EARC, but not FGD for purposes of access charges.[29] Second, given that PacBell's tariff states that FGC is not offered once FGD is available because it merges into FGD, it is odd that PacBell considers the service it provides to Sprint to be FGD while the service it provides to AT&T is considered FGC.[30] We are unable to understand how PacBell could be providing both FGC and FGD at the same end office. For all of these reasons, we find that PacBell's practices in its application of the EARC are inconsistent with its tariff. Accordingly, PacBell is in violation of Section 203(c) of the Act.

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[17] Complaint at ¶22; *see* PacBell Tariff § 6.7.16.
[18] Complaint at ¶ ¶ 7-8.
[19] *Id.* at ¶22.
[20] Answer at ¶22.
[21] PacBell Tariff § 6.7.16. We note that PacBell's tariff does not clearly specify that the conversion costs covered by the EARC are only those associated with the conversion of end office switches. Yet, this is the only possible construction because the alternative construction would have this tariff provision authorizing collection of the EARC to recover the costs of converting other switches located outside of end offices -- in tandems, for example -- in violation of the *EARC Order*. *See* ¶ 8, *supra*.
[22] PacBell Tariff § 6.2.6.
[23] PacBell Tariff 6.2.4(A).
[24] PacBell Tariff § 6.2.4(B).
[25] *See, e.g.*, PacBell Tariff § 6.2.4(A).
[26] Answer at ¶18.
[27] PacBell Tariff § 6.7.1(D).
[28] PacBell Tariff § 6.7.1(D)(2). PacBell does not charge access charges to Sprint for 900 service from non-converted end offices. Affirmative Defenses at ¶ 2.
[29] We note that the Bureau has granted waivers to LECs who wish to provide "virtual FGD" until such time as all of their end offices are fully converted. *See, e.g.*, Contel Service Corporation Revisions to Tariff F.C.C. No. 1, 4 FCC Rcd 2565 (Com. Car. Bur. 1989) (*Contel LEAS Order*). For example, Contel was granted a waiver so that it could charge the EARC and premium rates for the "virtual FGD," while charging less than premium access charges for FGA and FGB in those end offices where 10XXX dialing was not available. PacBell has neither sought nor been granted a similar waiver.
[30] PacBell Tariff § 6.2.3(A).

IV. CONCLUSION AND ORDERING CLAUSES

22. The Bureau has carefully reviewed the record in this proceeding and, for the reasons discussed above, finds that PacBell has violated Sections 201(b) and 203(c) of the Act. Accordingly, PacBell is liable for damages resulting from these violations. Although the precise amount of damages cannot be determined from the record at this time, Sprint has reserved the right to file a supplemental complaint for damages pursuant to Section 1.722 of the Commission's rules, 47 C.F.R. § 1.722.

23. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 208(a) of the Communications Act of 1934, as amended, 4780 U.S.C. §§ 151, 154(i), 154(j), and 208(a), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the above-captioned complaint filed by Sprint IS GRANTED to the extent indicated herein, and otherwise IS DENIED.

24. IT IS FURTHER ORDERED that PacBell shall immediately CEASE AND DESIST from charging, to the extent it continues to do so, EARCs on trunks carrying traffic that originates from non-converted end offices unless specifically authorized by an order of the Commission.

25. IT IS FURTHER ORDERED that Sprint, in accordance with the Commission's rules, *see* 47 C.F.R. § 1.722, may file a supplemental complaint concerning damages within 60 days after the release date of this Order.

26. IT IS FURTHER ORDERED that Sprint's Motion to Compel,[31] filed on June 26, 1991, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M. H. Wallman
Chief, Common Carrier Bureau

[31] Sprint served interrogatories on PacBell, who answered them with certain objections. Sprint subsequently filed a motion to compel responses to two of its interrogatories. Along with its opposition to Sprint's motion to compel, PacBell filed amended responses to those interrogatories. Because Sprint has not taken issue with PacBell's amended responses, we presume Sprint is satisfied. Therefore, Sprint's motion to compel is dismissed.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Various Requests in Connection with the Auction of 99 Licenses to Provide Personal Communications Services in the 2 GHz Band (Broadband PCS)	FCC Auction No. 4 File No. AUC-4

ORDER

Adopted: November 15, 1994; Released: November 15, 1994

By the Deputy Chief, Private Radio Bureau:

1. In a Public Notice issued on September 19, 1994, Mimeo No. 44805, the Commission announced that an auction for 99 Major Trading Area licenses to provide Personal Communications Services in the 2 GHz band (broadband PCS) would commence on December 5, 1994. This Public Notice also called for the submission of applications to participate in the auction (filed on FCC Form 175) no later than October 28, 1994. Seventy-seven parties filed Form 175 applications. We dismissed three applications as unacceptable for filing because they were filed after the deadline had passed, and the remainders we either accepted for filing or classified as incomplete, providing the applicant with an opportunity to resubmit a corrected application. *See* Public Notice, Mimeo No. 50451 (released November 1, 1994), and Public Notice, Mimeo No. 50506 (released November 4, 1994).

2. Two accepted applicants, Edward M. Johnson and Vivian E. Warner, have submitted along with their Form 175 applications challenges to the Commission's requirement that applicants tender an upfront payment to the Commission before they may be qualified to bid in the auction.[1] Johnson claims that the Commission's requirement that bidders in our broadband PCS auction make an upfront payment prior to the auction is not statutorily authorized by Section 309(j) of the Communications Act, and that the upfront payment requirement "constitutes an unlawful taking of property without just compensation." Johnson Request at 2. Warner states that she "is NOT financially qualified to advance to the government the required upfront payment . . . " (emphasis in original) and claims that it is unconstitutional to require the deposit of upfront payments. Addendum to Warner Application.

3. Though Johnson and Warner appear to intend their claims to be viewed as requests for waiver of the Commission's upfront payment requirement as applied to their respective applications, they are more properly treated as requests for the Commission to reconsider the upfront payment requirement generally. The Commission adopted the upfront payment requirement in its *Second Report and Order* in PP Docket No. 93-253, 59 FR 22980 (May 4, 1994). In the *Fifth Report and Order* in PP Docket No. 93-253, FCC 94-178 (released April 20, 1994), 59 FR 37566 (May 4, 1994), which sets forth competitive bidding rules specifically applicable to broadband PCS, the Commission confirmed that the considerations that led to the adoption of the upfront payment requirement in the *Second Report and Order* apply with equal force to competitive bidding for broadband PCS licenses. *See Fifth Report and Order* at ¶65. The *Fifth Report and Order* was published in the Federal Register on May 4, 1994. Under Section 1.429 of the Commission's Rules, interested parties were able to file petitions for reconsideration of the upfront payment rule until 30 days thereafter, or June 3, 1994. The Johnson and Warner Form 175 applications for the upcoming broadband PCS auction, containing their challenges to the upfront payment requirement, were filed with the Commission on October 26, 1994. Therefore, their challenges to the Commission's upfront payment requirement are procedurally defective.[2]

4. Notwithstanding the procedural infirmity of the Johnson and Warner claims, and notwithstanding the fact that neither Johnson nor Warner has supplied any legal analysis whatsoever in support of their arguments against the upfront payment requirement, it is important to reiterate that Section 309(j) of the Communications Act indeed confers upon the Commission ample statutory authority to impose the requirement that bidders make upfront payments prior to an auction, and that the Commission exercised that authority in accordance with the law. Section 309(j)(5) states that no party may participate in an auction "unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing." 47 U.S.C. § 309(j)(5). In response to this mandate, the Commission noted in the *Notice of Proposed Rule Making* in PP Docket No. 93-253, 8 FCC Rcd 7635 (1993) ("NPRM"), the importance of limiting bidding to serious qualified bidders and proposed the adoption of a refundable upfront payment by bidders to the Commission as a prior condition of participating in the auction. The Commission adopted an upfront payment requirement in the *Second Report and Order*, stating that such a rule is needed to "provide the necessary 'assurances' required by Section 309(j)(5) and deter frivolous and insincere bidding by discouraging speculators who may otherwise be tempted to 'game' our competitive bidding process." *Second Report and Order* at ¶ 171, n.131. The Commission reaffirmed this belief and specifically applied it to broadband PCS in the *Fifth Report and Order*. *See Fifth Report and Order* at ¶ 65. It is interesting to note

[1] Mr. Johnson requested a waiver of the upfront payment requirement prior to the Commission's July 1994 auction of nationwide licenses to provide Personal Communications Services in the 900 MHz band (narrowband PCS). The Commission denied that request. *See Order*, DA 94-768, released July 11, 1994. Mr. Johnson raises slightly different issues in the instant request.

[2] Two parties (Roland A. Hernandez and GTE Service Corporation) filed petitions for reconsideration of the *Fifth Report and Order* that raised issues concerning the upfront payment requirement unrelated to those raised by Johnson and Warner. *See Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, FCC 94-264 (released October 19, 1994), 59 FR 53364 (October 24, 1994), at ¶ ¶ 43-46. Neither Johnson nor Warner filed a petition for reconsideration of the *Fifth Report and Order*.

that in this rule making proceeding, Edward M. Johnson filed comments in response to the NPRM supporting upfront payments ranging between $10,000 and $1 million for some auctions. *See* Comments of Edward M. Johnson in PP Docket No. 93-253 at 3.

5. The Commission's belief in the need for upfront payments has been consistent and clear throughout the competitive bidding rule making proceeding. Granting the relief requested by Johnson and Warner would undermine the purposes underlying the upfront payment rule and deprive the Commission both of needed assurance that bidders in the broadband PCS auction are indeed serious and of a ready source of funds to satisfy any bid withdrawal or default penalties. To do so would damage the competitive bidding process and run counter to the intent of Congress.

6. In addition, on October 31, 1994, Johnson filed a "Petition to Dismiss Applications as Unacceptable for Filing," in which he claims that all of the applicants whose applications specify that they wish to be eligible to bid on all of the licenses in the December 5, 1994 broadband PCS auction should be dismissed because they could not possibly be financially qualified to win licenses and build PCS systems in all markets. Johnson misunderstands the purpose of the Form 175 license designation. An applicant specifies on its Form 175 the license on which it wishes to *be eligible* to bid, and an applicant's certification on the Form 175 that it is financially qualified does not require, as Johnson alleges, that the applicant have "on hand" all of the funds needed to win all of the licenses specified and to build those systems. Our competitive bidding process has been designed to allow applicants flexibility during the course of the auction by remaining eligible to bid on more licenses than they ever intend to win. The upfront payment tendered by an applicant sets the upper bound as to the licenses it may bid on, and potentially win, in any single round of the auction. As noted earlier, the upfront payment requirement has been designed to provide assurances required by Section 309(j)(5) and to deter frivolous and insincere bidding. Johnson's petition is grounded in the mistaken assumption that applicants must have "on hand" sufficient funds to acquire all of the licenses specified on their Form 175 applications and build the communications systems pursuant to those licenses.

7. Accordingly, IT IS ORDERED, for the reasons stated herein, that the requests of Edward M. Johnson and Vivian E. Warner that they not be required to tender to the Commission upfront payments in order to be qualified to submit bids in the Commission's upcoming auction of broadband PCS licenses on frequency blocks A and B are DENIED.

IT IS FURTHER ORDERED that the "Petition to Dismiss Applications as Unacceptable for Filing" filed by Edward M. Johnson is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Comcast Cablevision LOI-93-2
City of Tallahassee, Florida

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: November 18, 1994; Released: November 18, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In a letter to the Commission dated September 16, 1993, the City of Tallahassee, Florida alleged violations by Comcast Cablevision of Tallahassee, Florida ("Comcast") of Commission regulations governing the provision of cable television service. In response to this complaint, the Commission issued Letter of Inquiry 93-2 ("LOI") to Comcast on November 17, 1993.[1] The LOI asked Comcast to provide information concerning, among other issues, its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated.[2] Comcast responded to our LOI on December 15, 1993.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[3] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[4]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[5] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[6] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[7] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[8] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[9] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[10] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the pur-

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Patrick Keating, General Manager, Comcast Cablevision of Tallahassee, Florida, LOI-93-2 (November 17, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 207, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Comcast. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order Comcast to make refunds to subscribers in regard to Comcast's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] The LOI also requested information concerning Comcast's new service repair charge, negative option billing and its compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of the package. Other issues in the LOI will be dealt with subsequently.

[3] Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)(1992).

[4] Pub. L. No. 102-385 § 2 (b) (4) (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[5] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii)(1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[6] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1)(1992).

[7] *Id.*

[8] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2)(1992).

[9] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A)(1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[10] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h)(1992).

poses of rate regulation.[11] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[12]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[13] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, Comcast's services included a 13 channel basic tier, called Limited Service, for $7.95 per month and a 20 channel cable programming service tier, called Satellite Service, for $13.45 per month. Both tiers of service could be purchased together as a package, called Preferred Basic Service, for $21.40 per month.

7. The following chart summarizes Comcast's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Limited Service	13	$7.95
2. Satellite Service	20	$13.45
Total (Preferred Basic Service)	33	$21.40

8. Beginning September 1, 1993, the date our rate regulations became effective, Comcast restructured its service offerings. Comcast's restructured service offerings included a 12 channel basic tier, called Limited Basic, for $8.13 per month and a 17 channel cable programming service tier, called Standard Service, for $11.52 per month. Comcast also began offering four channels on an individual basis. The four channels were WTBS, The Family Channel, The Nashville Network and TNT. WTBS was originally in Comcast's Limited Service tier and TNT, The Family Channel and The Nashville Network were originally in Comcast's Satellite Service tier.

9. WTBS, The Family Channel and The Nashville Network could be purchased individually for $0.33 per month and TNT could be purchased individually for $0.49 per month. All four channels could be purchased as a package, called Value Pak, for $0.65 per month. The same four channels purchased individually cost subscribers $1.48 per month. If a subscriber purchased Limited Basic, Standard Service and Value Pak, this was called Preferred Service and cost $20.30 per month.

10. The following chart summarizes Comcast's service tier options as of the date of its response to our LOI:[14]

Offering	Channels	Price
1. Limited Basic	12	$8.13
2. Standard Service	17	$11.52
3. Value Pak	4	$0.65
Total (Preferred Service)	33	$20.30

11. Comcast states that WTBS, The Family Channel, The Nashville Network and TNT could be purchased either individually or collectively without purchasing any other level of service except basic service. Comcast explains, however, that a set-top converter box was needed if a subscriber wished to purchase any of the channels individually. At the time of our LOI, a converter cost $1.04 per month. Although initially 35 subscribers were billed for converter charges, Comcast explains that subsequently the company determined to waive this charge and to give the 35 subscribers a credit on their bills.

12. Comcast explains that in order for a subscriber to switch services Comcast must make a service call. For example, a subscriber who was not purchasing any of the individual channels or Value Pak and who decided to purchase some of the individual channels or Value Pak would have to pay the service charge. Comcast states that a service call costs subscribers $19.25 per trip. Comcast states, however, that it indefinitely waived fees charged when subscribers switched from receiving individual channels to Value Pak or from Value Pak to individual channels or discontinued Value Pak.

13. Comcast argues, *inter alia*, that it began offering its services individually and through the Value Pak package in order to implement Congress' intent to maximize consumer choice. However, based on this record, very few consumers elected to exercise choice. As of the date of its response, Comcast states that 652 subscribers have chosen not to receive Value Pak. We note that this means that only 1.5 percent of Comcast's total number of subscribers have chosen not to receive Value Pak.[15]

IV. DISCUSSION

14. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[16] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[17] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[18] First, we examine whether Comcast's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

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[11] H.R. Rep. No. 628, 102d Cong., 2d Sess. at 79 (1992).
[12] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).
[13] *Rate Order* ¶ 451.
[14] This Order does not evaluate Comcast's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.
[15] Comcast states on its FCC Rate Freeze Computation Form attached to its response that as of October 31, 1993, it had a total of 43,494 basic tier subscribers.
[16] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h)(1992).
[17] *Rate Order* ¶ 451.
[18] *Id.* at ¶ 453.

15. Comcast's restructuring effective September 1, 1993, involved its movement of one channel (WTBS) from its 13 channel Limited Service tier and three channels (TNT, The Family Channel and The Nashville Network) from its 20 channel Satellite Service tier to create the four-channel package that it alleges is not rate-regulated. Thus, Comcast removed channels from otherwise rate-regulated tiers to create a new package of channels. In so doing, Comcast avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Comcast had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, customers that were receiving the basic channel and the three cable programming service tier channels at issue continued to receive them after the restructuring, and there appears to be no sufficient justification for Comcast"s restructuring other than to avoid rate regulation.

16. Other factors corroborate our view that Comcast's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it automatically subscribed its customers to the offerings that previously had been part of its basic and cable programming service tiers. In light of these facts, it appears that Comcast's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if Comcast's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met the our requirements for a permissible collective offering of a la carte channels, then Comcast would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[19]

17. In our *Rate Order,* the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[20] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[21] This is not the type of offering that Comcast and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

18. Moreover, in the *Rate Order,* the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[22]

19. Under the two-part test that we set forth in the *Rate Order,* it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the four services, because subscribers may purchase three of the channels for $0.33 and the fourth channel for $0.49 or the four-channel package for $0.65 The second part of the test is whether the separate parts of the package constitute a "realistic service offering." The results of our review of Comcast's submission reveal that only 1.5 percent of Comcast's subscribers in Tallahassee chose not to subscribe to the Value Pak. Although only 652 of Comcast's subscribers chose not to purchase the a la carte package, our test does not specify what percentage would indicate that an offering is "a realistic service offering." However, this fact, together with the other factors present in this case,[23] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

20. Even if we were to apply the 15 interpretative guidelines set forth in our *Second Reconsideration Order,*[24] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Comcast's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from a regulated tier, the absolute number (four) was small.[25] Moreover, our test does not explain how the factors are to be weighed against each other. In these

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[19] In our *Going Forward Order,* we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking,* MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order").* Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. However, in order to determine whether Comcast evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[20] *Rate Order ¶ 329.*

[21] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.,* a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[22] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking,* 9 FCC Rcd 4119 (1994) *("Second Reconsideration Order"),* the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of a la carte channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[23] *See, e.g.,* ¶ ¶ 15-16, *supra.*

[24] *Id.* at ¶ 196.

[25] *Id.*

circumstances, we cannot say that it was clear to Comcast that its restructuring was not a permissible a la carte package.

21. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not an evasion of rate regulation.[26] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Comcast's restructuring was not a permissible a la carte package.

22. For that reason, we do not think that it would be equitable to subject Comcast to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation. In contrast, Comcast attempted to treat only four channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[27] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[28]

23. We will not require Comcast to restructure its tiers so as to return the channels offered in the a la carte package to the basic or standard tiers,[29] instead, on a prospective basis, therefore, we will consider Comcast's collective offering of a la carte channels a new product tier[30] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because Comcast's four-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject Comcast or its Tallahassee customers to the confusion and transaction costs that would result if we required Comcast to retier.

V. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that Comcast's package as it existed on November 17, 1993, may be treated as a new product tier under our *Going Forward Order*.

25. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[26] *See Going Forward Order* (adopted November 10, 1994).

[27] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[28] *Second Reconsideration Order* ¶ 196.

[29] We are not precluding Comcast from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[30] *Going Forward Order* (adopted November 10, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Warner Cable Communications LOI-93-14
Milwaukee, Wisconsin

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: November 18, 1994; Released: November 18, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In a letter to the Commission dated September 28, 1993, the City of Milwaukee alleged violations by Warner Cable Communications ("Warner Cable") of Commission regulations governing the provision of cable television service. In response to this complaint, the Commission issued Letter of Inquiry 93-14 ("LOI") to Warner Cable on November 17, 1993.[1] The LOI asked Warner Cable to provide information concerning, among other issues, its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated.[2] Warner Cable responded to our LOI on December 16, 1993.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[3] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[4]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[5] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[6] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[7] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[8] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[9] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[10] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Thomas Sharrard, President, Milwaukee Division, Warner Cable Communications, LOI-93-14 (November 17, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 207, Washington, D.C. We note that with the release of this Order, we are also releasing an order in Warner Cable's benchmark rate proceeding that incorporates our findings herein on the regulatory status of Warner Cable's package. *Warner Cable Communications*, Milwaukee, Wisconsin, CUID WI0438, *Memorandum Opinion and Order: Benchmark Filing to Support Cable Programming Service Price*, FCC 94 - 1285 (released November 18, 1994) (*"Warner Cable Benchmark Order"*). In addition, we note that we have been asked by the U.S. Court of Appeals for the Seventh Circuit to provide our views regarding a related case, *Time Warner v. Doyle*, No. 94-1894 (7th Cir.).

[2] The LOI also requested information concerning a premium access charge, negative option billing and compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of the package. Other issues in the LOI will be dealt with subsequently.

[3] Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)(1992).

[4] Pub. L. No. 102-385 § 2 (b) (4) (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[5] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii)(1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require (operators to carry PEG channels on tiers other than basic).

[6] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1)(1992).

[7] *Id.*

[8] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2)(1992).

[9] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A)(1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[10] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h)(1992).

"prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[11] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[12]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[13] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, Warner Cable's services included a 27 channel basic tier for $10.45 per month and a 24 channel cable programming service tier, called the standard tier, for $13.65 per month:

Offering	Channels	Price
1. Basic	27	$10.45
2. Standard	24	$13.65
TOTAL	51	$24.10

7. Beginning September 1, 1993, the date our rate regulations became effective, Warner Cable states that four channels were offered to its subscribers on an individual basis. Two of these channels, WTBS and WGN, were moved from the basic tier and two of the channels, Discovery and E!, were moved from the standard tier. Warner Cable states that these channels could be purchased individually for $0.79 each or as a package for $2.20. Warner Cable also changed its basic tier rate to $11.65 and its standard tier rate to $10.25. The following chart summarizes Warner Cable's service tier options as of the date of its response to our LOI:

Offering	Channels	Price
1. Basic	25	$11.65
2. Standard	22	$10.25
3. Package	4	$2.20 or $.79 per channel
TOTAL	51	$24.10 (if purchased package)

Warner Cable's restructuring allowed customers to receive the same 51 channels previously received at the same total price of $24.10 per month. An addressable converter, which costs $1.95 per month, is needed by all subscribers to any service other than basic. A $2.00 transaction fee is charged for switching from the new package to one or more of the individual channels. This fee initially was waived by Warner Cable.

8. Warner Cable argues, *inter alia*, that it began offering its services individually and through its package in order to implement Congress' intent to maximize consumer choice. However, based on this record, very few consumers elected to exercise choice. Warner Cable's response provides a breakdown of its subscribers who chose the package of individual channels. Of 7,310 basic-tier-only subscribers, 4,930 or 67 percent, subscribe to one or more of the individual a la carte channels; four percent subscribe to the package. Among standard-tier customers, 4,322 out of 82,971, or 5 percent, subscribe to one or more of the individual a la carte channels; 88 percent subscribe to the package. It appears that approximately 10 percent of Warner Cable's total subscriber base subscribes to the individual a la carte channels.[14]

IV. DISCUSSION

9. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering." An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[15] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[16] First, we examine whether Warner Cable's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

10. Warner Cable's restructuring effective September 1, 1993, involved its movement of 2 channels (WTBS and WGN) from its 27 channel basic tier and 2 channels (Discovery and E!) from its 24 channel standard tier to create the four-channel package that it alleges is not rate-regulated. Thus, Warner Cable removed channels from otherwise rate-regulated tiers to create a new package of channels. In so doing, Warner Cable avoided a rate reduction that would have occurred had the channels in the package remained on the rate-regulated tiers. Specifically, our review of Warner Cable's rate justification for its cable programming service tier indicates that the price for the 26 channels in the cable programming service tier and the package combined, if all the channels are deemed rate-regulated, would be $1.20 lower than the price Warner Cable charged for the cable programming service tier and the package combined after it restructured.[17] We believe that, other than avoiding this $1.20 rate reduction, there appears to be no sufficient justification for Warner Cable's restructuring, particularly given that customers that were receiving the two basic channels and the two cable programming service tier channels at issue continued to receive them after the restructuring.

11. Other factors corroborate our view that Warner Cable's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it automatically subscribed its custom-

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[11] H.R. Rep. No. 628, 102d Cong., 2d Sess. at 79 (1992).
[12] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).
[13] *Rate Order* ¶ 451.
[14] This figure is calculated by adding the total number of basic-only subscribers that receive any of the individual a la carte channels (4,930) to the number of standard subscribers that receive any of the individual a la carte channels (4,322); that sum, 9,252, is then divided by the sum of the total number of basic-only subscribers (7,310) plus the total standard customers (82,971) or 90,281.
[15] *Rate Order* ¶ 451.
[16] *Id.* at ¶ 453.
[17] *Warner Cable Benchmark Order* (released November 18, 1994).

ers to the offerings that previously had been part of its basic and cable programming service tiers. (More specifically, upon restructuring, Warner Cable automatically subscribed its basic-service-only customers to two of the four channels -- the two channels removed from the basic tier -- and automatically subscribed its standard-tier customers to the entire four-channel package.) In light of these facts, it appears that Warner Cable's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if Warner Cable's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met the Commission's requirements for a permissible collective offering of a la carte channels, then Warner Cable would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[18]

12. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[19] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[20] This is not the type of offering that Warner Cable and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

13. Moveover, in the *Rate Order*, the Commission determined that a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[21]

14. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the four services, because subscribers may purchase each channel for $0.79 or the four-channel package for $2.20. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." The results of our review of Warner Cable's submission reveal that 90 percent of the subscribers in Milwaukee did not choose to subscribe toindividual a la carte channels. Although only 9,252 of Warner Cable's 90,281 subscribers chose not to purchase the a la carte package, our test does not specify what percentage would indicate that an offering is "a realistic service offering." However, this fact, together with the other factors present in this case,[22] tends to show that the per-channel offering, in this instance, does not constitute a realistic service offering.

15. Even if we were to apply the 15 interpretative guidelines set forth in our *Second Reconsideration Order*,[23] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Warner Cable's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from a regulated tier, the absolute number (four) was small.[24] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to Warner Cable that its restructuring was not a permissible a la carte package.

16. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order* 's two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte

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[18] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. However, in order to determine whether Warner Cable evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[19] *Rate Order* ¶ 329.

[20] *See, e.g., Rate Order* at ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[21] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report & Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) *("Second Reconsideration Order")*, the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 interpretive guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[22] *See* ¶ ¶ 10-11, *supra*.

[23] *Id.* at ¶ 196.

[24] *Id.*

channels would be considered an evasion of rate regulation.[25] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Warner Cable's restructuring was not a permissible a la carte package.

17. For that reason, we do not think that it would be equitable to subject Warner Cable to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation. In contrast, Warner Cable attempted to treat only four channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances unclear, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[26] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[27]

18. We will not require Warner Cable to restructure its tiers so as to return the channels offered in the a la carte package to the basic or standard tiers,[28] instead, on a prospective basis, we will consider Warner Cable's collective offering of a la carte channels a new product tier[29] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier.[30] In light of the prior confusion over what constituted a permissible a la carte offering, and because Warner Cable's four-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject Warner Cable or its Milwaukee customers to the confusion and transaction costs that would result if we required Warner Cable to retier.

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that Warner Cable's package as it existed on November 17, 1993, may be treated as a new product tier under our *Going Forward Order*.

20. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[25] *See Going Forward Order* (adopted November 10, 1994).

[26] *Rate Order*, 8 FCC Rcd 5837 n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[27] *Second Reconsideration Order* ¶ 196.

[28] We are not precluding Warner Cable from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[29] *Going Forward Order* (adopted November 10, 1994).

[30] We recognize that in July 1994 Warner Cable added another channel to its package. This added channel is the subject of a pending Petition for Declaratory Ruling and in this Order we do not decide the regulatory status of that channel or the revised package.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Adelphia Cable Partners, L.P. LOI-93-42
South Dade County, Florida

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: November 18, 1994; Released: November 18, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission received a letter from Metropolitan Dade County, Florida dated September 23, 1993, alleging that Adelphia Cable Partners, L.P. ("Adelphia") violated Commission regulations governing cable television service. In response to this complaint, the Commission issued Letter of Inquiry 93-42 ("LOI") to Adelphia dated December 13, 1993.[1] The LOI asked Adelphia to provide information concerning its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated. Adelphia responded to our LOI on January 12, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[2] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[3]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[4] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[5] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[6] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[7] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[8] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[9] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[10] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[11]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[12] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Adelphia Cable Communications - South Dade, LOI-93-42 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 207, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Adelphia. Our decisions made herein will be made a part of that proceeding.

[2] Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)(1992).

[3] Pub. L. No. 102-385 § 2 (b) (4) (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[4] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii)(1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[5] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1)(1992).

[6] *Id.*

[7] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2)(1992).

[8] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A)(1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[9] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h)(1992).

[10] H.R. Rep. No. 628, 102d Cong., 2d Sess. at 79 (1992).

[11] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[12] *Rate Order* ¶ 451.

III. FACTS

6. Adelphia's response to our LOI states that prior to September 1, 1993, it offered an 18 channel basic tier for $10.00 per month and a 32 channel cable programming service tier for $13.95 per month. Both tiers of service could be purchased together as a package for $23.95 per month.

7. The following chart summarizes Adelphia's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Basic	18	$10.00
2. Cable Programming Service	32	$13.95
Total	50	$23.95

8. On August 30, 1993, Adelphia restructured its service offerings to include an 18 channel basic tier for $12.00 per month and, except for services it was required by law to carry on its basic tier, it said that it began offering all of its other channels individually. Adelphia argues, *inter alia*, that it began offering its services individually and through the CableValue package in order to implement Congress' intent to maximize consumer choice. However, based on this record, very few consumers elected to exercise such alleged choice.[13] At the time of its response to our LOI, Adelphia states that prices for individual channels ranged from $0.10 to $1.05 per month. It also offered these channels in a package, called CableValue, for $12.75 per month. Adelphia's basic tier and CableValue package could be purchased for $24.75 per month.

9. The following chart summarizes Adelphia's service tier options as of the date of its response to our LOI:[14]

Offering	Channels	Price
1. Basic	18	$12.00
2. CableValue pack	32	$12.75
Total	50	$24.75

10. In its response, Adelphia stated that it does not impose an upgrade charge for subscribers who either select a lesser number of individual services or who switch from a package to individual services, but that subscribers do have to pay $2.00 each time they change services following their initial selection, regardless of the number of services added or substituted. Moreover, Adelphia stated that there is a downgrade charge of $30.00 for a subscriber receiving services in addition to basic service who wishes to receive only basic service. In addition, in order to receive individual channels rather than the CableValue package, an addressable interdiction unit is necessary at a cost of $6.00 per month. Adelphia also stated that at the time of its response 50,881 of its approximately 51,000 subscribers purchased the CableValue Package; only 102 subscriptions to individual channels were made at that time. Based on these figures, assuming a best case scenario for Adelphia, each subscription to an individual channel represents a consumer; less than 0.2 percent of Adelphia's customers elected to subscribe to individual channels, indicating that essentially no one considered that they had a "realistic choice." This analyzes the facts most favorably to Adelphia because fewer than 102 customers may have subscribed to individual channels.

IV. DISCUSSION

11. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[15] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[16] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[17] First, we examine whether Adelphia's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the bulk of the channels that were in the cable programming service tier that Congress intended to be rate-regulated.

12. The table of Adelphia's service tier options as of the date of our LOI set out in paragraph 9 above almost mirrors the table in paragraph 7 that shows its service tier offerings prior to restructuring. Both before and after restructuring its service offerings Adelphia offered its subscribers an 18 channel basic service tier and a 32 channel tier or package. However, a significant difference is not reflected at all in the charts; the 32 channel CableValue pack offered after restructuring is offered as a tier of service whose prices would not be subject to rate regulation. Adelphia fundamentally changed its service to subscribers by removing 32 channels, or 64 percent of the total channels it offered, from rate regulation and by eliminating the entire cable programming service tier. In so doing, Adelphia avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent (and denied the over 99 percent of its customers who received the package the benefit of the reduced price to which rate regulation entitled them). That is, if Adelphia had not restructured on August 30, 1994, it would have been required to recalculate its rates in accordance with the *Order* we released on May 3, 1993, which generally required cable operators to reduce their rates.

13. We believe that Adelphia has not provided a sufficient justification for this change to overcome our finding that there is an evasion of rate regulation. To the contrary, virtually all of Adelphia's subscribers to its former cable programming service tier were given the package of identical channels. (Few subscribers actually subscribed to individual channels instead of the CableValue package; at most, only 102 of Adelphia's over 51,000 subscribers subscribed to individual channels at the time of Adelphia's LOI response). Other than an attempt to evade rate regulation, there appears to be no sufficient justification for this restructuring.

14. Other factors corroborate our finding that Adelphia's restructuring had the effect of evading rate regulation. First, Adelphia discontinued its cable programming service

[13] *See infra* ¶ ¶ 13 and 14.

[14] This Order does not evaluate Adelphia's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.

[15] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h)(1992).

[16] *Rate Order* ¶ 451.

[17] *Rate Order* ¶ 453.

tier entirely and moved all of the channels comprising it to the new package on the eve of regulation. Second, it automatically subscribed its customers to the offerings that previously had made up its cable programming service tier. In light of these facts, we find that Adelphia's restructuring of its offerings constituted an evasion of our rate regulation rules.

15. Because Adelphia's restructuring is a purported collective offering of a la carte channels, we also must determine whether the offering met the Commission's requirements for a permissible collective offering of a la carte channels. If the offering met the Commission's requirements for a permissible collective offering of a la carte channels, then Adelphia would not have evaded our rate regulations because it would not have been required to reduce its price for the collective a la carte package.[18]

16. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[19] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered "a la carte" in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[20] This is not the type of offering that Adelphia and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered "a la carte" to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

17. Moreover, in the *Rate Order*, the Commission determined that "a la carte packages" would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[21]

18. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the packaged services, because the price for the individual channels range from $0.10 to $1.05 and the package price is $12.75. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." The results of our review of Adelphia's submission reveal that more than 99 percent of the subscribers did not choose to subscribe to individual "a la carte" channels.[22] This fact, together with the other factors present in this case,[23] tends to show that in this instance the per-channel offering does not constitute a realistic service offering.

19. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*, we still would conclude that Adelphia's offering does not constitute a realistic service offering. Adelphia's submission reveals additional evidence weighing against a finding that its individual a la carte channels constitute a realistic service offering. The most important factor, of course, is that "an entire regulated tier has been eliminated and turned into an 'a la carte' package."[24] Moreover, a "significant percentage" of channels in the package "were removed from regulated tiers," which would "weigh against unregulated treatment."[25] In this case, 100 percent of the channels in the package were removed from a regulated tier.

20. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers, within the meaning of Section 3(l)(2) of the 1992 Cable Act. In reaching this conclusion, we acknowledged that as applied to many fact patterns, we "did not provide a clear test for determining whether an a la carte package was permissible."[26]

21. We do not believe, however, that our a la carte rules are unclear as applied to the fact pattern at issue in this case. In the *Rate Order* we stated that a cable operator could notescape rate regulation simply by calling what

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[18] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore generally will be subject to our rate regulation rules. However, in order to determine whether Adelphia evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[19] *Rate Order* ¶ 329.

[20] *See, e.g., Rate Order* ¶ 453 n.1116 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[21] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 interpretive guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[22] *See* ¶ 10, *supra*.

[23] *See* ¶ ¶ 12-14, *supra*.

[24] *Second Reconsideration Order* at ¶ 196.

[25] *Id.*

[26] In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered an evasion of rate regulation. *See Going Forward Order* (adopted November 10, 1994).

otherwise would be a rate-regulated tier an a la carte package.[27] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning [it] into an a la carte package."[28] This, however, is exactly what Adelphia did by moving 32 channels to an allegedly unregulated package and eliminating its entire cable programming service tier. While we have acknowledged that aspects of our evaluation of a la carte packages were unclear,[29] as applied to these particular facts, this prong of the test is clear and requires no additional guidance or explanation from the Commission. In light of the fact that it is clear that elimination of an entire regulated tier and transformation of that tier into an a la carte package is an evasion of rate regulation, we find that Adelphia's retiering in fact clearly constitutes just such an evasion.

22. We find that Adelphia's CableValue package, as the offering existed in Dade County, Florida on December 13, 1993, the date of our LOI, must be treated as a rate-regulated cable programming service tier. As a result, effective 90 days from the release date of this Order, Adelphia must either offer the channels in this package as part of the respective rate-regulated tiers from which they came or offer the channels collectively as a separate rate-regulated tier of cable programming service.[30] We further conclude that this package is a rate-regulated offering as of September 1, 1993, and that the channels composing it must be counted as rate-regulated channels for purposes of rate justification as of that date.

V. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that Adelphia's CableValue package is subject to rate regulation as of September 1, 1993, and the channels composing it must be counted by Adelphia as rate-regulated channels for purposes of rate justification, as of that date.

24. IT IS FURTHER ORDERED that, effective 90 days from the release date of this Order, Adelphia must either offer these channels as part of the respective rate-regulated tiers from which they came or offer the channels collectively as a separate rate-regulated tier of cable programming service.

25. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[27] *Rate Order* ¶ 328 n.808.

[28] *Second Reconsideration Order* ¶ 196.

[29] *Warner Cable Communications*, Milwaukee, Wisconsin, LOI-93-14.

[30] To provide 90 days gives Adelphia ample time to comply with the 30 day notice provisions of our regulations for rate and programming changes. *See* 47 C.F.R. §§ 76.309(c)(3)(i)(B), 76.932 and 76.964. Adelphia, of course, may continue to offer any channels as single channel offerings consistent with the 1992 Cable Act and our rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter

GTE Southwest Incorporated AAD 94-108

and

Pioneer Telephone Cooperative, Inc.

Joint Petition for Waiver of the
Definition of "Study Area" Contained
in Part 36, Appendix-Glossary
of the Commission's Rules

and

Pioneer Telephone Cooperative, Inc.

Petition for Waiver of Section 61.41(c)
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: November 30, 1994; Released: December 1, 1994

By the Chief, Accounting and Audits Division:

I. INTRODUCTION AND BACKGROUND

1. On July 19, 1994, GTE Southwest Incorporated ("GTE") and Pioneer Telephone Cooperative, Inc. ("Pioneer") (collectively, "Petitioners") filed a joint petition for waiver ("Joint Petition") of the definition of "Study Area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. The requested waiver would allow GTE to consummate the sale of 12 Oklahoma telephone exchanges to Pioneer. Pioneer also seeks a waiver of the Commission's price cap rules contained in Section 61.41(c) to exempt it from the price cap "all-or-nothing" rule and to allow Pioneer to operate as a rate of return company.[1]

2. On September 22, 1994, the Common Carrier Bureau ("Bureau") released a public notice soliciting comments on the Joint Petition.[2] We received comments in support of the Joint Petition from three parties.[3] At the request of Bureau staff, Petitioners provided additional information concerning the Joint Petition.[4] On October 28, 1994, Pioneer submitted a copy of a Corporation Commission of Oklahoma ("Oklahoma Commission") Order approving the sale of 12 exchanges to Pioneer.[5] In this Order, we find that allowing Pioneer to change its study area boundaries to include the exchanges it intends to purchase from GTE, and allowing GTE to remove these exchanges from the Oklahoma study area, will serve the public interest. We therefore grant the Petitioners' petition for waiver as explained more fully herein.

3. Pioneer is a cost company that provides telephone service in 63 Oklahoma exchanges with approximately 39,000 access lines.[6] GTE is a price cap company that operates in four states, including Oklahoma. GTE's Oklahoma operation serves 38 exchanges with approximately 114,000 access lines. Pioneer proposes to purchase 12 exchanges from GTE.[7] These exchanges, which are located Oklahoma, have approximately 8,800 access lines.

II. STUDY AREA WAIVER

4. A study area is a geographical segment of a carrier's telephone operations. Generally, a study area corresponds to a carrier's entire service territory within a state. Thus, carriers that operate in more than one state typically have one study area for each state, and carriers that operate in a single state typically have a single study area. Carriers perform jurisdictional separations at the study area level.[8] For jurisdictional separations purposes, the Commission froze study area boundaries effective November 15, 1984.[9] Carriers wishing to change their study area boundaries can file a petition for waiver of the applicable rule.[10] The Commission has three primary concerns in evaluating petitions seeking such a waiver: first, that the change does not adversely affect the Universal Service Fund ("USF") support program;[11] second, that the state commission(s) having

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[1] Section 61.41(c) of the Commission's rules (the "all-or-nothing" rule) provides that when a carrier which is not subject to out price cap rules (a "non-price cap company") acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation. *See* 47 C.F.R. § 61.41(c).

[2] Public Notice, 9 FCC Rcd 5257 (Com. Car. Bur. 1994).

[3] Comments were filed by the National Exchange Carrier Association, Inc. ("NECA"), the National Telephone Cooperative Association ("NTCA"), and the United States Telephone Association ("USTA").

[4] *Ex parte* letter from Edwin Shimizu, GTE Service Corporation, to William Caton, Acting Secretary, FCC, dated Nov. 4, 1994 ("GTE Nov. 4 Letter").

[5] *Ex parte* letter from Edwin Shimizu, GTE, to William Caton, Acting Secretary, FCC, dated Oct. 28, 1994 (Containing the Corporation Commission of Oklahoma Order, Order No. 384039 (June 14, 1994) ("Oklahoma Order").

[6] "Cost Companies" are those exchange carriers that receive compensation for the use of their facilities in originating and terminating interstate telecommunications services on the basis of their actual costs.

[7] GTE proposes to sell the following 12 exchanges to Pioneer: Chattanooga, Camanche, Davidson, Frederick, Gould, Granfield, Hastings, Hollis, Loco, Manitou, Temple, and Tipton.

[8] The phrase "jurisdictional separations," or "separations," refers to the process of dividing costs, revenues, and expenses between an exchange carrier's state and interstate operations. *See generally* 47 C.F.R. §§ 36.1 - 36.741.

[9] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (Dec. 12, 1984) (*Joint Board Recommendation*), adopted by the Commission, 50 Fed. Reg. 939 (Jan. 8, 1985) (*Order Adopting Recommendations*).

[10] 47 C.F.R. Part 36, Appendix-Glossary.

[11] *See Joint Board Recommendation*, 49 Fed. Reg. at 48337, para. 65. the Commission created the USF to preserve and promote universal service. *See* Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 96 FCC 2d 781 (1984). The USF allows local exchange carriers with high local loop costs to allocate a portion of those costs to the

regulatory authority do not object to the change;[12] and finally, that public interest supports grant of the waiver. Any party requesting a waiver of a rule must show good cause why that waiver should be granted, and must persuade the Commission that the requested relief will not undermine the interests served by the rule.[13]

5. Pioneer seeks a waiver to add the 12 exchanges into its existing Oklahoma study area. GTE seeks a waiver to remove the exchanges from its Oklahoma study area.[14] Petitioners contend that the public interest requires that this Commission grant the requested waivers. In particular, Pioneer states that it plans to provide upgraded services and facilities in this exchange that will improve service quality.[15]

6. Petitioners estimate that granting this study area waiver would result in a net increase in the USF support of approximately $128,620. Petitioners estimate that Pioneer's annual USF support would increase by approximately $1,197,540.[16] Petitioners also estimate that GTE's annual USF support would decrease by approximately $1,068,920.[17]

7. The 12 GTE exchanges are contiguous with Pioneer's existing Oklahoma service territory. Pioneer states that it plans to open an office in Frederick, Oklahoma to provide local customer service and dispatch operations to the acquired exchanges. Pioneer states that it plans to provide improved customer service in these exchanges. Pioneer states that its plans call for technological improvements to be made in the acquired exchanges, including the use of the latest signaling technology. Pioneer plans to provide equal access[18] in some of these exchanges by June 1996.[19] Pioneer also states that it plans to: construct 12 new digital central offices; add fiber for both toll and subscriber use; add new cable to replace aging open wire and cable; upgrade multi-party lines to single party service; and provide standby power for exchanges currently without back-up power. Pioneer states that it envisions a geographically consolidated company that is capable of, and dedicated to, providing high-quality telephone and other telecommunications services to the rural areas it serves and proposes to serve.[20]

III. DISCUSSION

USF Impact

8. The Commission froze all local exchange carrier ("LEC") study area boundaries as they existed on November 15, 1984, in part, to ensure that LECs do not set up high cost exchanges within their existing service territories as separate study areas to maximize high cost support.[21]

9. The Petitioners provided estimates of changes in their USF draws that would result from grant of the Joint Petition. Pioneer estimates that its annual USF draw would increase by $1,197,540 (from $2,597,416 to $3,794,956) as a result of its acquisition and upgrade of the 12 exchanges. GTE states that the removal of the exchanges from its Oklahoma study area would decrease its USF support by $1,068,920 (from $5,730,648 to $4,661,728). As a result, the Petitioners estimate a net increase in the USF of $128,620 - an amount that in the overall context of this transaction, will not have a significant, adverse effect on the USF at this point in time.[22]

10. As we have stated previously, we are concerned about the possibility that this sale and a number of similar proposed transactions could, in the aggregate, have a substantial effect on the size of the USF. In one respect, this concern has been mitigated to some extent by the Commission's adoption of the Joint Board's recommendation for an indexed cap on the USF for the next thirteen months.[23] There is, however, one complicating factor. Any increase in the USF draw of any USF recipient also reduces the amounts other USF recipients receive. As a consequence, errors of estimation in the potential impact on USF may mask the adverse effects upon the support that other LECs receive. While we are inclined to agree with the Petitioners that their estimates of the impact of this transaction on

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interstate jurisdiction, thus enabling the states to establish lower local exchange rates in those areas. To qualify for USF support, a LEC's total company unseparated loop costs must exceed 115 percent of the nationwide average for such costs. *See* 47 C.F.R. § 36.631.

[12] *See* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974, 5976 (1990) (*"Study Area Notice"*). In that notice the Commission described the factors that led to the present restriction on study area changes and tentatively concluded that future modifications to study area boundaries may be approved if the state jurisdiction does not oppose the change.

[13] 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972). The three-part test for a study area waiver is part of the good cause showing required for all waivers.

[14] GTE states the it will adjusts it price cap indices to reflect the sale of these exchanges, effective July 1, 1995. *Ex parte* letter from Edwin Shumizu, GTE Service Corporation, to William Caton, Acting Secretary, FCC, dated Nov. 23, 1994 ("GTE Nov. 23 Letter").

[15] Joint Petition at 2.

[16] GTE Nov. 4 Letter. Pioneer currently receives approximately $2,597,416 in USF support and would receive approximately $3,794,956 under its proposal -- an increase in USF support of $1,197,540.

[17] Joint Petition at 12. GTE currently receives approximately $5,730,648 in USF support and would receive approximately $4,661,728 in USF under its proposal -- a reduction in USF support of $1,068,920.

[18] Equal access allows an interexchange carrier's (IXC's) customers to place calls on that carrier's network by dialing 1 plus the area code and number (1+) instead of dialing extra digits. With equal access, customers have the choice of which IXC to access by dialing 1+.

[19] Joint Petition at 2.

[20] *Id.* at 3.

[21] *See Order Adopting Recommendations*, 50 Fed. Reg. at 939.

[22] The approximate net effect is less than $14.70 per access line, per year, including all upgrades.

[23] The Commission recently adopted the Joint Board's recommendation for an indexed cap on the USF. The Joint Board recommended, and the Commission adopted, interim rules that would limit the rate of growth of the USF to the rate of growth in the total number of working loops nationwide. That rate has generally ranged from two percent to four percent per year. This moderate growth rate will allow the USF to continue to provide adequate support to carriers serving high-cost areas, while preventing excessive increases in the USF. *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 9 FCC Rcd 334 (1993) ("Recommended Decision"), *adopted* by the Commission, 9 FCC Rcd 303 (1993) ("Interim Order").

USF appears to be *de minimis*, if the Petitioners' estimate is too low, other USF recipients could have their USF support lowered by an amount that is not *de minimis*.[24] We therefore grant the requested study area waiver, subject to the condition that any USF increase associated with the sale of 12 GTE exchanges to Pioneer not exceed $1,197,540 per calendar year. Accordingly, we conclude that approving this study area waiver as conditioned above will not adversely affect the USF at this point in time.

State Commission Views

11. The Oklahoma Commission approved the transfer of the 12 exchanges.[25] The Oklahoma Commission states that "consummation of the proposed transaction will result in a better integration and consolidation of the 12 telephone exchanges with the existing exchanges owned and operated by Pioneer with all of the accompanying economic and service benefits that are to be derived therefrom for the subscribers."[26] The Oklahoma Commission states that it finds that it is in the public interest to approve the transaction between Pioneer and GTE.[27] In addition, the Oklahoma Commission does not object to the Petitioners' proposed study area waiver. Accordingly, we conclude that the second criterion for a study area waiver (*i.e.*, that the state commission does not object to the change) is satisfied.

Public Interest Finding

12. The third criterion for determining whether a study area waiver should be granted is whether the public interest supports granting the waiver. We believe the Petitioners have provided such a showing. Pioneer has stated its intention of replacing and upgrading the existing facilities, and the Oklahoma Commission, which regulates local service, has approved this merger. Pioneer states that its plans call for technological improvements to be made in the acquired exchanges, including the use of the latest signaling technology.[28] Pioneer intends to begin providing equal access by June 1996 in some of these exchanges. Pioneer also states that it plans to construct 12 new digital central offices, add fiber for both toll and subscriber use, add new cable to replace aging open wire and cable, upgrade multi-party line to single party service, and provide standby power for exchanges currently without back-up power.[29]

13. We conclude, based upon the record as a whole, that the Petitioners have made the necessary showings that granting the requested waiver petition would improve customer service without adversely affecting the USF and, thus, would promote the public interest. As stated above, the Oklahoma Commission has approved the transfer of the 12 exchanges to Pioneer, and the condition contained in paragraph 10, *supra*, will preclude significant adverse effect upon the USF and its recipients. Therefore, we grant the study area waiver petition to permit GTE to remove the 12 exchanges from its Oklahoma study area, and to permit Pioneer to add the acquired exchanges into its existing study area, subject to the condition that the increase in USF payments that result from the transfer of exchanges and upgrading of facilities, not exceed $1,197,540 per annum.

IV. PRICE CAPS WAIVER

The Petition

14. Pioneer also seeks waiver of the Commission's rules governing the acquisition of price cap companies by non-price cap companies. Pioneer seeks a waiver of rule Section 61.41(c) to allow it to operate as a cost company, rather than a price cap company, despite its acquisition of existing price cap exchanges.

15. Section 61.41(c) of the Commission's rules provides that when a non-price cap company acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation.[30] Under this rule, Pioneer's acquisition of the 12 GTE exchanges would obligate it to exit the NECA pools and become subject to price cap regulation. Pioneer argues that the rule's application in this instance is contrary to the public interest and would not serve the purposes for which the rule was adopted.[31] Pioneer contends that: (i) the Commission's concern to prevent cost shifting between affiliates is not at issue here; and (ii) the concern to prevent a company from using acquisitions and choosing a regulatory system to "game" the system is also not raised by the facts in this petition.

Discussion

16. The Commission's rules governing mergers and acquisitions provide that when a non-price cap company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[32] The rationale for this rule is stated in the *LEC Price Cap Reconsideration Order*. First, in the absence of the rule, a company might attempt to shift costs from its price cap affiliate to its non-price cap affiliate, allowing that affiliate to earn more (because of its greater revenue requirement) without affecting the earnings of the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Second, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could "game" the system by, for example, building up a large rate base under rate of return regulation, then opting for price caps again and cutting its costs to an efficient level.[33] The Com-

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[24] The Bureau is concerned that the increased number of proposed transactions, of which this is but one, could, in the aggregate, have a substantial effect on the amounts that other USF recipients will receive. In the past, the actual USF impact in several cases has risen far above the amount petitioners suggested when they sought study area waivers. *See* Delta Telephone Company, 5 FCC Rcd 7100 (1990), whose USF support grew from $82,500 in 1991 to $396,910 in 1993; and US West and Gila River Telecommunications, Inc., 7 FCC Rcd 2161 (1992), whose USF support escalated from $169,155 in 1992 to $492,300 in 1993.

[25] Oklahoma Commission Order at 3.

[26] Oklahoma Commission Order No. 384039 (June 9, 1994) at 2.

[27] *Id.* at 2.

[28] Joint Petition at 2.

[29] *Id.* at 2-3.

[30] 47 C.F.R. § 61.41(c).

[31] Joint Petition at 5-6.

[32] Second Report and Order, 5 FCC Rcd 6786, 6827 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991), *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *aff'd, National Rural Telecom Association v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

[33] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, 2706.

mission stated, however, that "in some cases, the efficiencies created by the purchase and sale of [a few] exchanges may outweigh the threat of 'gaming' the system. Such cases might justify narrow waiver of the all-or-nothing rule."[34]

17. We find that there is good cause to grant Pioneer a waiver of the all-or-nothing rule. The first concern cited by the Commission, cost shifting between affiliates, is not applicable in this case, because Pioneer is not seeking to maintain separate affiliates under different systems of regulation. The second concern underlying the rule, allowing a company to "game" the system, could be a source of concern because GTE's sale of these high-cost exchanges will alter the network costs that comprise the basis for GTE's current price caps.[35] GTE has stated, however, it will reduce its interstate revenue requirements to reflect the sale of the 12 exchanges to Pioneer, and adjust its price cap indices accordingly.[36]

18. For the reasons described herein, we grant a waiver of the all-or-nothing rule for Pioneer. For the present, we will continue to regulate Pioneer as a cost company. Because we are waiving Section 61.41(c), Pioneer need not withdraw from the NECA pools. We note that, as with any other rate of return carrier, Pioneer may elect price cap regulation in the future after it withdraws from the NECA pools.

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c) and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, that the Joint Petition of GTE Southwest Incorporated and Pioneer Telephone Cooperative, Inc. for waiver of Part 36, Appendix-Glossary, of the Commission's rules, 47 C.F.R. Part 36 Appendix-Glossary, IS GRANTED subject to the condition set forth above.

20. IT IS FURTHER ORDERED that the Petition of Pioneer Telephone Cooperative, Inc. for waiver of Section 61.41(c) of the Commission's rules, 47 C.F.R. § 61.41(c), IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

[34] *Id.* at 2706, para. 149, n.207.

[35] The generic issue that is posed more generally by this set of circumstances is being considered by the Commission in CC Docket No. 94-1. The Commission may require automatic adjustments to price cap rates to reflect the costs that are being removed from price cap regulation after reviewing the record in that docket.

[36] GTE Nov. 23 Letter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE Midwest Incorporated AAD 94-95

and

Winnebago Cooperative
Telephone Association

Joint Petition for Waiver of the
Definition of "Study Area" Contained
in Part 36, Appendix-Glossary
of the Commission's Rules

and

Winnebago Cooperative
Telephone Association

Petition for Waiver of
Section 61.41(c)
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: November 30, 1994; Released: December 1, 1994

By the Chief, Accounting and Audits Division:

I. INTRODUCTION AND BACKGROUND

1. On July 11, 1994, GTE Midwest Incorporated ("GTE") and Winnebago Cooperative Telephone Association ("WCTA") (collectively, "Petitioners") filed a joint petition for waiver ("Joint Petition") of the definition of "Study Area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. The requested waiver would allow GTE to consummate the sale of one Iowa telephone exchange to WCTA. WCTA also seeks a waiver of the Commission's price cap rules contained in Section 61.41(c) to exempt it from the price cap "all-or-nothing" rule[1]

2. On August 3, 1994, the Common Carrier Bureau ("Bureau") released a public notice soliciting comments on the Joint Petition.[2] We received comments in support of the Joint Petition from three parties.[3] On July 22, 1994, WCTA submitted a copy of an Iowa Utilities Board Order approving the sale of the exchange to WCTA.[4] In this Order, we find that allowing WCTA to change its study area boundaries to include the exchange it intends to purchase from GTE, and allowing GTE to remove this exchange from its study area boundaries, will serve the public interest. We therefore grant the Petitioners' petition for waiver as explained more fully below.

3. WCTA is an average schedule company.[5] that provides telephone service in 15 Iowa exchanges with approximately 5,700 access lines. GTE is a price cap company that operates in four states, including Iowa. GTE's Iowa operation serves 311 exchanges, with approximately 250,000 access lines. WCTA proposes to purchase the Buffalo Center exchange from GTE. This exchange, which is located in northern Iowa, has 600 access lines.

II. STUDY AREA WAIVER

4. A study area is a geographical segment of a carrier's telephone operations. Generally, a study area corresponds to a carrier's entire service territory within a state. Thus, carriers that operate in more than one state typically have one study area for each state, and carriers that operate in a single state typically have a single study area. Carriers perform jurisdictional separations at the study area level.[6] For jurisdictional separations purposes, the Commission froze study area boundaries effective November 15, 1984.[7] Carriers wishing to change their study area boundaries can file a petition for waiver of the applicable rule.[8] The Commission has three primary concerns in evaluating petitions seeking such a waiver: first, that the change does not adversely affect the Universal Service Fund ("USF") support program;[9] second, that the state commission(s) having

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[1] Section 61.41(c) of the Commission's rules (the "all-or-nothing" rule) provides that when a carrier which is not subject to our price cap rules (a "non-price cap company") acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation.

[2] Public Notice, 9 FCC Rcd 3650 (Com. Car. Bur. 1994).

[3] Comments were filed by the National Exchange Carrier Association, Inc. ("NECA"), the National Telephone Cooperative Association ("NTCA"), and the United States Telephone Association ("USTA").

[4] *Ex parte* letter from Margaret Nyland, Winnebago Coop. Tel. Assoc., to William Caton, Acting Secretary, FCC, dated Oct. 25, 1994 (Order forwarded on July 22, 1994 Iowa Utilities Board Order Docket No. SPU-94-7 (July 12, 1994) ("Iowa Utilities Board Order").

[5] Average schedule companies are compensated for providing interstate exchange access and transport services on the basis of formulas that simulate cost study settlements.

[6] The phrase "jurisdictional separations," or "separations," refers to the process of dividing costs, revenues, and expenses between an exchange carrier's state and interstate operations. *See generally* 47 C.F.R. §§ 36.1 - 36.741.

[7] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (Dec. 12, 1984) (*Joint Board Recommendation*), adopted by the Commission, 50 Fed. Reg. 939 (Jan.8 , 1985) (*Order Adopting Recommendations*).

[8] 47 C.F.R. Part 36, Appendix-Glossary.

[9] *See Joint Board Recommendation*, 49 Fed. Reg. at 48337, para. 65. The Commission created the USF to preserve and promote universal service. *See* Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 96 FCC 2d 781 (1984). The USF allows local exchange carriers with high local loop costs to allocate a portion of those costs to the interstate jurisdiction, thus enabling the states to establish lower local exchange rates in those areas. To qualify for USF support, a LEC's total company unseparated loop costs must exceed 115 percent of the nationwide average for such costs. *See* 47 C.F.R. § 36.631.

regulatory authority do not object to the change;[10] and finally, that the public interest supports grant of the waiver. Any party requesting a waiver of a rule must show good cause why that waiver should be granted, and must persuade the Commission that the requested relief will not undermine the interests served by the rule.[11]

5. WCTA seeks a waiver to add the Buffalo Center exchange to its existing Iowa study area. GTE seeks a waiver to remove this exchange from its Iowa study area.[12] Petitioners contend that the public interest requires that this Commission grant the requested waivers. In particular, WCTA states that it plans to provide upgraded services and facilities in this exchange that will improve service quality.

6. Petitioners estimate that granting the study area waiver would increase their annual USF support by $1,000.[13] WCTA currently receives approximately $159,200 in annual USF assistance as a NECA pool participant.[14] WCTA states that with the acquisition of the Buffalo Center exchange, its annual USF supporthwould increase to approximately $160,200.[15] As a consequence, WCTA estimates its annual USF support will increase by $1.000. GTE states that it currently receives no USF support for its Iowa study area because its average cost per loop is below the established national eligibility threshold for USF support.[16] GTE also states that it would not be eligible for USF support if the waiver is granted.

7. The Petitioners imply that it would be more efficient for WCTA to serve the Buffalo Center exchange than GTE because the exchange is much closer to WCTA's service center and business office than GTE's service center and business office.[17] WCTA states that it plans to provide improved customer service in this exchange.[18] WCTA states that it plans to make technological improvements to the acquired exchange, including the installation of a fully-digitized central office within three months of the acquisition. WCTA states that this central office will then provide custom calling, CLASS features, and SS7 trunk signalling. In addition, WCTA plans to provide equal access[19] by June 1995. WCTA also states that it plans to upgrade two-party service to single party service, and extend its existing fiber facilities to permit the community school in Buffalo Center to access the Iowa Educational Fiber Network. WCTA states that much of the existing cable plant is aerial, and states that it plans to replace these facilities with buried, storm-proof cable over the next three to five years. WCTA also states that it envisions a geographically consolidated company that would be capable of providing high-quality telecommunications services to the rural areas that it serves and proposes to serve.[20]

III. DISCUSSION

USF Impact

8. The Commission froze all local exchange carrier ("LEC") study area boundaries as they existed on November 15, 1984, in part, to ensure that LECs do not set up high cost exchanges within their existing service territories as separate study areas to maximize high cost support.[21]

9. The Petitioners have provided estimates of the impact of the requested study area waivers upon the USF. Those estimates indicate that WCTA's USF support would increase to approximately $160,200 from its 1994 USF draw of approximately $159,200. As a result, granting the study area waiver would increase WCTA's USF support by $1,000 annually, an amount that is, in the overall context of this transaction and its effects, *de minimis*.

10. As we have stated previously, we are concerned about the possibility that this sale and a number of similar proposed transactions could, in the aggregate, have a substantial effect on the size of the USF. In one respect, this concern has been mitigated to some extent by the Commission's recent adoption of the Joint Board's recommendation for an indexed cap on the USF for the next thirteen months.[22] There is, however, one complicating factor: any increase in the USF draw of any USF recipient also reduces the amounts other USF recipients receive. As a consequence, errors of estimation in the potential impact on USF may mask the adverse effects upon the support that other LECs receive. While we are inclined to agree

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[10] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974, 5976 (1990) (*"Study Area Notice"*). In that notice the Commission described the factors that led to the present restriction on study area changes and tentatively concluded that future modifications to study area boundaries may be approved if the state jurisdiction does not oppose the change.

[11] 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972). The three-part test for a study area waiver is part of the good cause showing required for all waivers.

[12] GTE states that it has already adjusted its price cap indices to reflect the sale of the Buffalo Center exchange. *Ex parte* letter from Edwin Shimizu, GTE Service Corporation, to william Caton, Acting Secretary, FCC, dated Nov. 23, 1994 ("GTE Nov. 23 Letter").

[13] *Id.* at 12.

[14] NECA 1993 USF Report, Section 6 at p.13.

[15] Joint Petition , Attachment 2 at 1.

[16] USF support is provided for study areas with average costs per loop that are at least 115% of the national average. The national average cost per loop is currently $239, so the threshold for USF support is $275 (*i.e.*, (the national average cost per loop -- $239) x (115% or 1.15)= $275 -- the USF eligibility support threshold). *See* 47 C.F.R. § 36.631, National Exchange Carrier Association, Inc., 1993 USF Report Section 1 p.3. GTE states its average cost per loop in Iowa is $259. See Joint Petition, Attachment 2.5

[17] Joint Petition at 2.

[18] *Id.* at 4.

[19] Equal access allows an interexchange carrier's ("IXC's") customers to place calls on that carrier's network by dialing 1 plus the area code and number (1+) instead of dialing extra digits. With equal access, customers have the choice of which IXC to access by dialing 1+.

[20] Joint Petition at 4.

[21] *See Order Adopting Recommendations*, 50 Fed. Reg. at 939.

[22] The Commission recently adopted the Joint Board's recommendation for an indexed cap on the USF. The Joint Board recommended, and the Commission adopted, interim rules that would limit the rate of growth of the USF to the rate of growth in the total number of working loops nationwide. That rate has generally ranged from two percent to four percent per year. This moderate growth rate will allow the USF to continue to provide adequate support to carriers serving high-cost areas, while preventing excessive increases in the USF. *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 9 FCC Rcd 334 (1993) ("Recommended Decision"), *adopted* by the Commission, 9 FCC Rcd 303 (1993) ("Interim Order").

with the Petitioners that their estimate of the impact of this transaction on the USF appears to be *de minimis*, if the Petitioners' estimate is too low, other USF recipients could have their USF support lowered by an amount that is not *de minimis*.[23] We therefore grant the requested study area waiver, subject to the condition that any USF increase associated with the sale of GTE's Buffalo Center exchange to WCTA not exceed $1,000 per calendar year. We thus conclude that, as conditioned above, the USF will not be adversely affected by the study area waivers that the Petitioners have requested.

State Commission Views

11. The Iowa Utilities Board approved the transfer of the Buffalo Center exchange.[24] The Iowa Utilities Board states that WCTA is ready, willing, and able to provide service comparable to that provided by GTE. In addition, the Board does not object to the Petitioners' proposed study area waiver. Accordingly, we conclude that the second criterion for granting a study area waiver (*i.e.*, that the state commission does not object to the change in study area boundaries) has been satisfied.

Public Interest Finding

12. The third criterion for determining whether a study area waiver should be granted is whether the public interest supports granting the waiver. WCTA states that it plans to begin to replace and upgrade the existing facilities immediately and to complete that process within three to five years. Under WCTA's plan, two-party service will be upgraded to single party service, and fiber facilities will be extended from existing WCTA exchanges into the Buffalo Center exchange "enabling the community school in Buffalo Center to access the Iowa Education Fiber Network."

13. We conclude, based upon the record before us as a whole, that the Petitioners have made the necessary showings that granting the requested waiver petition will improve customer service and thus promote the public interest. As stated above, the Iowa Utilities Board has approved the transfer of the Buffalo Center exchange to WCTA, and the condition contained in paragraph 10, *supra*, will preclude significant adverse effects upon the USF and its recipients. Therefore, we grant the study area waiver petition to permit GTE to remove the Buffalo Center exchange from its Iowa study area and to permit WCTA to add the acquired exchange into its existing study area, subject to the condition that the increase in USF payments that result from the transfer of exchanges and upgrading of facilities, not exceed $1,000 per annum.

IV. PRICE CAPS WAIVER

The Petition

14. WCTA also seeks waiver of the Commission's all-or-nothing rule governing the acquisition of price cap companies by non-price cap companies. WCTA seeks a waiver of this rule to allow its continued participation in the NECA pools following acquisition of the Buffalo Center telephone exchange from GTE.

15. The Commission's all-or-nothing rule provides that when a non-price cap company acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation.[25] Under this rule, WCTA's acquisition of GTE's Buffalo Center exchange would obligate it to exit the NECA pools and become subject to price cap regulation. WCTA argues that the rule's application in this instance is contrary to the public interest and would not serve the purposes for which the rule was adopted.[26] WCTA contends that: (i) the Commission's concern to prevent cost shifting between affiliates is not at issue here; and (ii) the concern to prevent a company from using acquisitions and choosing a regulatory system to "game" the system is also not raised by the facts in this petition.

Discussion

16. The Commission's rules governing mergers and acquisitions provide that when a non-price cap company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[27] The rationale for this rule is stated in the *LEC Price Cap Reconsideration Order*. First, in the absence of the rule, a company might attempt to shift costs from its price cap affiliate to its non-price cap affiliate, allowing that affiliate to earn more (because of its greater revenue requirement) without affecting the earnings of the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Second, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could "game" the system by, for example, building up a large rate base under rate of return regulation, then opting for price caps again and cutting its costs to an efficient level.[28] The Commission stated, however, that "in some cases, the efficiencies created by the purchase and sale of [a few] exchanges may outweigh the threat of 'gaming' the system. Such cases might justify narrow waiver of the all-or-nothing rule."[29]

17. We find that there is good cause to grant WCTA a waiver of the all-or-nothing rule. The first concern cited by the Commission, cost-shifting between affiliates, is not applicable in this case, because WCTA is not seeking to maintain separate affiliates under different systems of regulation. The second concern underlying the rule, allowing a

[23] The Bureau is concerned that the increased number of proposed transactions, of which this is but one, could, in the aggregate, have a substantial effect on the amounts that other USF recipients will receive. In the past, the actual USF impact in several cases has risen far above the amount petitioners suggested when they sought study area waivers. *See* Delta Telephone Company, 5 FCC Rcd 7100 (1990), whose USF support grew from $82,500 in 1991 to $396,910 in 1993; and US West and Gila River Telecommunications, Inc., 7 FCC Rcd 2161 (1992), whose USF support escalated from $169,155 in 1992 to $492,300 in 1993.

[24] Iowa Utilities Board Order at 3.

[25] 47 C.F.R. § 61.41(c).

[26] Joint Petition at 5-6.

[27] Second Report and Order, 5 FCC Rcd 6786, 6827 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991), *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *aff'd, National Rural Telecom Association v. FCC* , 988 F.2d 174 (D.C. Cir. 1993).

[28] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, 2706.

[29] *Id.* at 2706, para. 149, n.207.

company to "game" the system, could be a source of concern because GTE's sale of this high-cost exchange will alter the network costs that comprise the basis for GTE's current price caps.[30] GTE has stated, however, that it has already reduced its interstate revenue requirements to reflect the sale of the Buffalo Center exchange to WCTA, and that it adjusted its price cap indices accordingly.[31]

18. For the reasons described herein, we grant a waiver of the all-or-nothing rule for WCTA. For the present, we will continue to regulate WCTA as an average schedule company. Because we are waiving Section 61.41, WCTA need not withdraw from the NECA pools. We note that, as with any other non-price cap carrier, WCTA may elect price cap regulation in the future after it withdraws from the NECA pools.

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c) and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, that the Joint Petition of GTE Midwest Incorporated and Winnebago Cooperative Telephone Association for waiver of Part 36, Appendix-Glossary, of the Commission's rules, 47 C.F.R. Part 36 Appendix-Glossary, IS GRANTED subject to the condition set forth above.

20. IT IS FURTHER ORDERED that the Petition of Winnebago Cooperative Telephone Association for waiver of Section 61.41(c) of the Commission's rules, 47 C.F.R. § 61.41(c), IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

[30] The generic issue that is posed more generally by this set of circumstances is being considered by the Commission in CC Docket No. 94-1. The Commission may require automatic adjustment to price capped rates to reflect the costs that are being removed from price cap regulation after reviewing the record in that docket.

[31] GTE Nov. 23 Letter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

United Utilities, Inc. AAD 94-58

Petition for Waiver of the
Definition of "Study Area"
contained in Part 36, Subpart H,
Appendix-Glossary of the
Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: November 30, 1994; Released: December 1, 1994

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On April 20, 1994, United Utilities, Inc. ("United") filed a petition for waiver ("Petition") of the definition of "Study Area" contained in Part 36 of the Commission's rules.[1] This waiver would allow United to incorporate four remote locations in Alaska within its existing study area. On May 6, 1994, the Common Carrier Bureau ("Bureau") released a public notice soliciting comments on United's petition for waiver.[2] We received comments supporting the petition from two parties: the National Exchange Carrier Association, Inc. ("NECA") and the United States Telephone Association ("USTA"). At the request of Bureau staff, United provided additional financial and cost data concerning the petition.[3] In this Order, we find that incorporating these four remote Alaskan communities into United's existing study area will serve the public interest. Therefore, as explained more fully herein, we grant United's petition for waiver.

II. BACKGROUND

2. United operates a local telephone company that serves approximately 4,000 access lines in 57 remote Alaskan Bush communities.[4] United proposes to incorporate four additional remote areas into its existing study area, and provide telephone service to these areas. United seeks to serve approximately 43 subscribers that are currently unserved in these four remote areas.

3. A study area is a geographical segment of a carrier's telephone operations. Generally, a study area corresponds to a carrier's entire service territory within a state. Thus, carriers that operate in more than one state typically have one study area for each state, and carriers that operate in a single state have a single study area. Carriers perform jurisdictional separations at the study area level.[5] For jurisdictional separations purposes, the Commission froze study area boundaries effective November 15, 1984.[6] Carriers wishing to change their study area boundaries can file a petition for waiver of the applicable rule.[7] The Commission has three primary concerns in evaluating petitions seeking such a waiver: first, that the change does not adversely affect the Universal Service Fund ("USF") support program;[8] second, that the state commission(s) having regulatory authority do not object to the change;[9] and finally, that the public interest supports grant of the waiver.

III. PETITION

4. United seeks a waiver to incorporate four remote areas into its existing Alaska study area. These four remote areas contain the following communities: Lake Minchumina, Manely Hot Springs, Central, and Livengood.[10] According to United, Commission approval of its waiver request would permit it to serve approximately 43 subscribers that currently are unserved. United currently receives approximately $1,500,000 in annual USF support.[11] United estimates that the additional USF support for providing service to these 43 subscribers would be approximately $81,000.[12]

5. United argues that the public interest requires that the

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[1] *See* 47 C.F.R. Part 36, Subpart H, Appendix-Glossary.

[2] Public Notice, 9 FCC Rcd 2044 (Com. Car. Bur. 1994).

[3] *Ex parte* letter from William Keane, United Utilities, Inc., to William Caton, Acting Secretary, FCC, dated Oct. 14, 1994 (Supplemental data was forwarded on July 15, 1994) ("July 15 Supplement"), Sept. 8, 1994 ("Sept. 8 Supplement") and Sept. 16, 1994 ("Sept. 16 Supplement").

[4] The term "bush communities" refers to small villages in rural Alaska that are isolated from larger cities by rugged terrain and harsh weather conditions.

[5] The phrase "jurisdictional separations," or "separations," refers to the process of dividing costs, revenues, and expenses between an exchange carrier's state and interstate operations. *See generally* 47 C.F.R. §§ 36.1 - 36.741.

[6] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (Dec. 12, 1984) (*Joint Board Recommendation*), adopted by the Commission, 50 Fed. Reg. 939 (Jan. 8, 1985) (*Order Adopting Recommendations*).

[7] 47 C.F.R. Part 36, Appendix-Glossary.

[8] *See Joint Board Recommendation*, 49 Fed. Reg. at 48337, para. 65. The Commission created the USF to preserve and promote universal service. *See* Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 96 FCC 2d 781 (1984). The USF allows local exchange carriers with high local loop plant costs to allocate a portion of those costs to the interstate jurisdiction, thus enabling the states to establish lower local exchange rates in those areas. To qualify for USF support, a LEC's total company unseparated loop costs must exceed 115 percent of the nationwide average for such costs. *See* 47 C.F.R. § 36.631.

[9] *See* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974, 5976 (1990) (*"Study Area Notice"*). In that notice the Commission described the factors that led to the present restriction on study area changes and tentatively concluded that future modifications to study area boundaries be approved if the state jurisdiction does not oppose the change.

[10] Petition at 1.

[11] National Exchange Carrier Association, Inc., 1993 USF Report at Section 6, p. 2.

[12] Sept. 16 Supplement. USF amounts broken down by location: Lake Minchumina $15,375; Central $1,583; Manely Hot Springs $5,801; and Livengood $58,283 -- for a total of $81,042.

Commission grant the requested waiver.[13] United states that the Alaska Public Utilities Commission ("Alaska PUC") has authorized its request and found that the public convenience and necessity requires that United provide local exchange service to these areas.[14] United contends that by granting the waiver and allowing United to provide telephone service to these unserved communities in the Alaskan Bush, the Commission would be reaffirming and promoting universal service in furtherance of its statutory mandate under Section 1 of the Communications Act.[15]

IV. DISCUSSION

6. For separations purposes the Commission froze all local exchange carrier study area boundaries as they existed on November 15, 1984.[16] The Commission took that action, in part, to ensure that local exchange carriers do not set up high cost exchanges within their existing service territory as separate companies to maximize high cost support.[17]

7. On the basis of the record before us, we conclude that the Commission's reasons for freezing study area boundaries would not be compromised by authorizing United to incorporate four remote Alaskan Bush communities into its existing study area. The study area freeze was adopted to prevent local exchange carriers from decomposing and recombining study areas, to increase interstate revenue requirement and exchange carrier compensation. We find that granting the waiver to permit the incorporation of four remote Alaskan communities into the existing United study area, subject to the condition set forth below, would serve the public interest.

8. United estimates that by incorporating the four Alaskan Bush communities into its existing study area, USF support payments would increase by approximately $81,000 annually.[18] United argues that under prior Commission decisions such an amount would be deemed *de minimis* for USF purposes.[19] As we have previously stated, however, any increase in the USF draw of any USF recipient reduces the amounts other USF recipients receive.[20] As a consequence, errors of estimates in the potential impact on USF may mask the adverse effects upon the support that other LECs receive. While we are inclined to agree with United that its estimates of the impact of this transaction on the USF appear to be *de minimis*, if United's estimate is too low, other USF recipients could have their USF support lowered by an amount that is not *de minimis*.[21] We therefore grant the requested study area waiver, subject to the condition that any USF increase associated with the incorporation of the four Alaskan Bush communities into United's existing study area does not exceed $81,042 per calendar year.

9. We conclude, based upon the record before us, that United has made the necessary showings for granting the requested waiver petition. The condition imposed on United will preclude significant adverse effects upon the USF and its recipients and provide adequate support for the extension of service to unserved parties of Alaska that has been authorized by the Alaska PUC. Finally, United will bring telephone service to customers who are presently unserved and, thus, the action we take here promotes the public interest. Therefore, we grant the study area waiver petition to permit United to incorporate the four remote locations into its existing Alaska study area subject to the lone condition contained herein. We believe that such action is consistent with our responsibility under the Communications Act to make telephone service available to all the people of the United States.[22]

V. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c), and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the Petition of United Utilities, Inc., for waiver of Part 36, Appendix-Glossary, of the Commission's rules, 47 C.F.R. Part 36 Appendix-Glossary, IS GRANTED to the extent stated herein.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief,
Common Carrier Bureau

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[13] Petition at 3.

[14] Petition at Attachment, Alaska Public Utilities Commission Orders, Order No. 1 U-91-93, dated June 12, 1992 ("Lake Minchumina Order"); Order No. 1 U-93-29, dated Sept. 20, 1993 ("Manely Hot Springs Order"); Order No. 1 U-93-27, dated Sept. 20, 1993 ("Central Order"); Order No. 1 U-93-34, dated Sept. 21, 1993 ("Livengood Orders"). Lake Minchumina Order at 2; Manely Hot Springs Order at 2; Central Order at 2; and Livengood Order at 2.

[15] Petition at 3.

[16] *See Order Adopting Recommendations*, 50 Fed. Reg. at 939.

[17] *Id.*

[18] *See supra* n.12.

[19] Petition at 2, *citing Telephone Utilities of Washington, Inc.*, 7 FCC Rcd 3007 (1992) (Study Area Waiver Order that found a USF payment increase from $4.54 million to $4.55 million to be *de minimis*).

[20] The Commission recently adopted the Joint Board's recommendation for an indexed cap on the USF. The Joint Board recommended, and the Commission adopted, interim rules that limit the rate of growth of the USF to the rate of growth in the total number of working loops nationwide. That rate has generally ranged from two percent to four percent per year. This moderate growth rate will allow the USF to continue to provide adequate support to carriers serving high-cost areas, while preventing excessive increases in the USF. *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 9 FCC Rcd 334 (1993) ("Recommended Decision"), *adopted* by the Commission, 9 FCC Rcd 303 (1993) ("Interim Order").

[21] The Bureau is concerned that the increased number of proposed transactions, of which this is but one, could, in the aggregate, have a substantial effect on the amounts that other USF recipients will receive. In the past, the actual USF impact in several cases has risen far above the amount petitioners suggested when they sought study area waivers. *See* Delta Telephone Company, 5 FCC Rcd 7100 (1990), whose USF support grew from $82,500 in 1991 to $396,910 in 1993; and US West and Gila River Telecommunications, Inc., 7 FCC Rcd 2161 (1992), whose USF support escalated from $169,155 in 1992 to $492,300 in 1993.

[22] 47 U.S.C. § 151.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CLINTON CABLE LIMITED PARTNERSHIP

Petition for Reconsideration

of Certification of
Eagle Township
to Regulate Basic Cable Service Rates
FCC Community ID No. (MI1315)

MEMORANDUM OPINION AND ORDER

Adopted: December 1, 1994; Released: December 2, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 15, 1993, Clinton Cable Limited Partnership ("Clinton") filed a timely Petition for Reconsideration of Certification challenging the certification of Eagle Township ("Eagle") to regulate rates for basic cable service and associated equipment.[1] Eagle filed an objection to Clinton's petition for reconsideration to which Clinton filed a reply. In addition, Clinton filed an additional pleading pursuant to the Commission's July 29, 1994 Order.[2]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchising authority has actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[7]

II. DISCUSSION

Clinton's Effective Competition Claim

3. Clinton argues that its cable system is subject to effective competition because its system has less than 30 percent penetration in Eagle Township, its franchise area.[8] Clinton claims that it serves only 148 of the 704 "homes" in its franchise area, or 21 percent of the total number of "homes." Clinton updates the numbers somewhat in its Supplement of August 19, 1994, in which it notes that there actually are 746 "homes" in Eagle Township. As supporting documentation Clinton provides a copy of the relevant 1990 Census housing data which indicates that there are 746 "housing units" in Eagle Township. In addition, Clinton provides a copy of a subscriber printout dated October 21, 1993, which demonstrates that Clinton has 148 subscribers. Finally, Clinton provides a declaration under penalty of perjury by a responsible official certifying to the accuracy of the data included in the petition.[9]

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[10] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[11] Clinton has failed to meet this burden. Specifically, Clinton inappropriately relied upon "housing unit" data rather than "household" data to support its effective competition claim. Horizon's claim is inappropriately based on the number of housing units (that is, occupied and vacant units) within the franchise area. Our rules, however, require the use of data reflecting the number of "households" (*i.e.*, occupied housing units) in the franchise area. *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon Order"*).[12] As Clinton has failed to base its effective competition claim on household data as required by our rules, we will deny its petition.

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[1] Eagle filed its Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Competition ("FCC Form 328") on September 30, 1993. The certification became effective on October 30, 1993.

[2] *See Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] *Xw P37sIXP* 47 U.S.C. § 543(a)(4).

[4] *Xw P37sIXP* 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911. *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of a cable system. 47 C.F.R. § 76.905(a) and (b)(1).

[9] Declaration of Alan Baird, General Manager, dated November 10, 1993.

[10] 47 C.F.R. § 76.906.

[11] 47 C.F.R. § 76.911(b).

[12] As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend

Other Matters

5. In its objection to Clinton's petition, Eagle argues that Clinton is not subject to effective competition because Clinton has "redefined" its franchise area. Eagle alleges that Clinton has made an affirmative decision to limit its service area even though its franchise does not restrict service to a specific area of the township. According to Eagle, Clinton's actual service area consists of 210 households, of which Clinton serves 148. Under this redefined franchise area, Eagle concludes that Clinton actually serves 70 percent of the households in the service area. In light of this, Eagle argues that Clinton's showing of effective competition must be based on its "redefined" franchise area. Clinton denies Eagle's allegation asserting that the terms of its franchise agreement with Eagle require Clinton to expand into unserved areas of the Township when the population density reaches a level of 35 households per cable mile. Clinton states that not only has it complied with the franchise agreement, but that it has expanded the number of households it serves in Eagle Township by 24% over the last two years. Clinton argues that the mere presence of unserved areas within the franchise area does not limit service to specific communities. In light of our decision that Clinton has failed to rely on appropriate housing data for purposes of demonstrating effective competition, we see no need to address Eagle's argument at this time.

III. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Clinton Cable Limited Partnership challenging the certification of Eagle Township to regulate Clinton's basic cable service rates IS DENIED.

7. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

8. IT IS FURTHER ORDERED that, Clinton SHALL FILE the required rate justifications on the applicable forms with Eagle Township, MI within thirty (30) days of the release date of this *Memorandum Opinion and Order* or within thirty (30) days of receipt of notice from the franchising authority that it is regulating Clinton's rates, whichever is later.

9. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

"households" to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra.* The term "household" is defined for purposes of the 1990 Census data as "all the persons who occupy a housing unit." Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term reflects only occupied housing units. The term "housing unit," however, was defined by the Census Bureau to include both occupied and vacant housing units.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-9

In the Matter of

Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies	RM-7981 RM-8004

SECOND MEMORANDUM OPINION AND ORDER

Adopted: November 28, 1994; Released: December 2, 1994

By the Commission: Commissioner Barrett issuing a statement.

INTRODUCTION

1. By this action, we are refining our rules and policies for making spectrum available for emerging telecommunications technologies. Specifically, we are amending the negotiation procedures for mandatory relocation of existing microwave facilities to provide for use of independent estimates of the cost to replace an existing facility in resolving disputes between licensees of existing facilities and new service providers. We are also modifying the relocation plan to extend the mandatory negotiation period for public safety entities to two years. The relocation plan for public safety facilities will now provide a three-year period for voluntary negotiations followed by a two-year period for mandatory negotiations. This action responds to a Petition for Reconsideration filed jointly by the Public Safety Microwave Committee (PSMC), the Association of Public-Safety Communications Officials-International, Inc. (APCO), the County of Los Angeles (LA County), and the Forestry-Conservation Communication Association (FCCA) (collectively "Petitioners"). By this action, we hope to encourage expeditious relocation of incumbent users of the emerging technologies band, and increase the speed with which new technologies and services will be brought to market in that band. At the same time, we believe that our actions properly balance the interests of the different parties and will safeguard the rights of incumbents and ensure a smooth transition for them and their customers.

BACKGROUND

2. At previous stages of this proceeding, we took the following general actions: 1) in the *First Report and Order* (*First R&O*), we allocated spectrum for emerging technologies in the 1850-1990 MHz, 2110-2150 MHz, and 2160-2200 MHz bands (2 GHz bands) that could be used by new services, such as personal communications services (PCS) and adopted most aspects of our voluntary relocation transition plan;[1] 2) in the *Second Report and Order*, we reallocated five fixed microwave bands and adopted associated rules to accommodate existing 2 GHz fixed microwave users required to relocate;[2] and, 3) in the *Third Report and Order* (*Third R&O*), we finished the details of our transition plan.[3] Finally, in the *Memorandum Opinion and Order* (*MO&O*) responding to petitions for reconsideration of the *Third R&O*, we revised and clarified the rules relating to relocation of existing microwave facilities, particularly those used for public safety purposes.[4]

3. Petitioners' request for reconsideration addresses specific decisions regarding public safety facilities that we made in the *First R&O*, the *Third R&O* and the *MO&O*. In the *First R&O*, we exempted licensees of incumbent public safety facilities from involuntary relocation, but encouraged them to relocate on a voluntary basis when the spectrum is needed by an emerging technology provider. At that time we believed that adequate spectrum could be made available for services using emerging technologies through the voluntary relocation of incumbent public safety facilities. In the *Third R&O*, we maintained the public safety exemption, but clarified the definition of public safety.[5] In the *MO&O*, on our own motion, we concluded that PCS may be precluded or severely limited in some areas unless public safety licensees relocate; that in previous decisions we underestimated the difficulty that PCS will have in sharing spectrum with incumbent public safety licensees; and that allowing all public safety facilities to remain in the band indefinitely would defeat our primary goal in this proceeding of providing usable spectrum for the implementation of emerging technologies. Consequently, we decided that it would be in the public interest to subject all incumbent facilities, including those used for public safety, to mandatory relocation if an emerging technology provider requires the spectrum used by the incumbent.

4. In the *MO&O*, we further concluded that public safety facilities warrant special consideration because they had previously been excluded from involuntary relocation and because of the sensitive nature of their communications. Therefore, we adopted for these entities a relocation plan consisting of a four-year voluntary period followed by a one-year mandatory period to negotiate relocation agreements, instead of the two-year voluntary and one-year mandatory negotiation periods to which all other 2 GHz fixed microwave incumbents are subject.[6] Further, we concluded

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[1] *First Report and Order and Third Notice of Proposed Rule Making*, ET Docket No. 92-9, 7 FCC Rcd 6886 (1992).

[2] *Second Report and Order* , ET Docket No. 92-9, 8 FCC Rcd 6495 (1993).

[3] *Third Report and Order and Memorandum Opinion and Order*, ET Docket No. 92-9, 8 FCC Rcd 6589 (1993).

[4] *Memorandum Opinion and Order*, ET Docket No. 92-9, 9 FCC Rcd 1943 (1994).

[5] In the *Third R&O*, we defined the "public safety" facilities exempted from mandatory relocation as those on which the majority of communications are used directly for police, fire, or emergency medical services. *See* note 3, *supra*, at 6610.

[6] The voluntary period (four years for certain public safety incumbents, two years for all other incumbents) would commence with the Commission's acceptance of applications for license of emerging technology services for spectrum to be used by licensed services. The one-year mandatory period would begin for an incumbent whose facilities are in spectrum allocated for unlicensed devices when an emerging technology provider or representative initiates negotiations; it begins in spectrum to be used by licensed services when an emerging technology provider or representative initiates negotiations after the voluntary period.

that the involuntary relocation policy adopted in the *First R&O*, would ensure that all incumbent entities required to relocate their operations, including public safety, would receive equivalent or better facilities at no cost to them.[7] Specifically, the involuntary relocation provides that:

-All relocation expenses will be paid entirely by the emerging technology licensee. These expenses will include all engineering, equipment, and site costs and FCC fees, as well as any reasonable additional costs.

-Relocation facilities must be fully comparable to those being replaced.

-All activities necessary for placing the new facilities into operation, including engineering and frequency coordination, must be completed before relocation.

-The new communications system must be fully built and tested before the relocation could commence.

-Should the new facilities, within one year, prove not to be equivalent in every respect, the emerging technology licensee must pay to relocate the incumbents licensee's operation to its original facilities until complete equivalency is attained.

5. PSMC, APCO, LA County, and FCCA filed a joint Petition for Reconsideration of the *MO&O*. Petitioners request that we not subject incumbent public safety facilities to any mandatory relocation. Six responses to the Petition for Reconsideration and five reply comments were filed.[8]

DISCUSSION

6. *Petition*. Petitioners argue that we should reinstate public safety's exemption from mandatory relocation because: 1) we ignored Congressional concerns; 2) we acted without prior notice and opportunity for public comment; 3) we failed to provide an adequate basis for our decision; 4) our decision is inconsistent with our grant of pioneer's preferences based on capabilities for sharing the 2 GHz band; 5) forced relocation of public safety operations will disrupt communications services that protect the safety of life and property; and 6) forced relocation will impose additional burden on rural public safety microwave systems.[9] These issues will be addressed *seriatim*.

7. Petitioners first argue that Congress has directed the Commission to give public safety special considerations when allocation decisions are made.[10] They claim that Congress was even more explicit regarding public safety use of the 2 GHz band in its handling of the FY 1993 Appropriations Bill. In support of this argument, they cite an amendment to the Senate bill that specified a detailed transition plan for the reallocation of the 2 GHz band, similar to the overall plan subsequently adopted by the Commission.[11] They also note that the Senate adopted a perfecting amendment to the initial amendment that would have excluded state and local government 2 GHz fixed microwave licensees from mandatory relocation.[12]

8. Second, Petitioners contend that we acted without allowing opportunity for interested parties to comment. They claim that our decision to eliminate the public safety exemption was an arbitrary and unexplained departure from our prior policy.[13] Third, they argue that we failed to cite any substantial evidence in the record to support our decision.[14]

9. Fourth, Petitioners also claim that our conclusion that sharing the 2 GHz frequencies between the incumbent fixed microwave service and the new PCS service will not be possible contradicts our award of pioneer's preferences in the PCS proceeding to American Personal Communications (APC) and to Omnipoint Communications, Inc. (Omnipoint) based on their developmental technologies for sharing the available spectrum between these two services. Petitioners argue that if sharing is feasible that we should reinstate the public safety exemption from forced relocation.[15]

10. Fifth, Petitioners claim that if we do not reinstate the public safety exemption, public safety agencies will be forced to engage in complex negotiations with PCS providers where public safety incumbents will be at a disadvantage. Petitioners argue that significant disputes are likely to arise regarding the direct and indirect cost of relocation and the acceptability of replacement facilities. They state that public safety entities, which have limited resources, are likely to be at a disadvantage in negotiations with PCS providers, who have ample resources. They submit that public service entities, therefore, could be forced to accept less favorable terms and replacement facilities.[16]

11. Sixth and finally, petitioners argue that even if there is a need for 2 GHz spectrum in urban areas, complete elimination of the public safety exemption will adversely affect rural public safety systems. They contend that our plan disadvantages these systems unnecessarily by giving them effectively only a one-year negotiation period as the four-year voluntary negotiation period will expire before PCS licensees are likely to need the spectrum. Petitioners claim that this will result in rural public safety microwave licensees having little or no advance notice that a PCS

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[7] The obligations of the emerging technology provider when relocation is involuntary are set forth in the *First R&O*. *See First R&O, supra*, at 6890.

[8] Responses were filed by American Association of State Highway and Transportation Officials Special Committee on Communications; American Mobile Satellite Corporation; American Personal Communications; Cox Enterprises, Inc.; Personal Communications Industry Association; and UTAM, Inc. Reply comments were filed by Apple Computer, Inc.; the Los Angeles County Sheriff's Department; the Los Angeles Police Department; Petitioners; and the West Covina Police Department.

[9] *Petition for Reconsideration (Petition)* filed jointly by the Public Safety Microwave Committee, the Association of Public-Safety Communications Officials-International, Inc., the County of Los Angeles, and the Forestry-Conservation Communication Association (May 25, 1994).

[10] *Petition, supra*, at 4-7, also *See* Rep. No. 356, 98th Cong., 1st Sess. 27 (1983).

[11] *Id.* at 5-6, 138 Cong. Rec. S10346 (July 27, 1992) (statement of Senator Hollings).

[12] *Id.* at 6, 138 Cong. Rec. S10351 (July 27, 1992) (statement of Senator Bumpers). The Senate amendment addressing relocation of 2 GHz incumbents and associated public safety concerns was removed from the legislation when the bill reached Conference Committee [138 Cong. Rec. H9570 (September 28, 1992)].

[13] *Petition* at 7-12.

[14] *Id.* at 12-17.

[15] *Id.* at 17-19.

[16] *Id.* at 2.

provider needs their frequencies and will result in unreasonably short time periods to reach mutually acceptable relocation agreements.[17]

12. *Responses.* Parties opposing the petition argue that: 1) our rules do not conflict with Congressional concerns; 2) the record concerning spectrum overcrowding supports our decision; 3) we changed our policy after reasoned analyses that included consideration of an adequate record; 4) our decision to award pioneer's preferences for spectrum sharing technologies does not conflict with our decision to eliminate public safety's exemption from mandatory relocation; and 5) Petitioners fail to demonstrate that relocation will be harmful to public safety fixed microwave operations.

13. Cox Enterprises, Inc. (Cox) and Apple Computer, Inc. (Apple) argue that our decision is consistent with the intent of Congress.[18] Cox states that throughout this proceeding, all of our actions reflect the Congressional concern that the protection of "safety of life and property" be a top priority in the allocation of spectrum. It further submits that the special transition period for public safety facilities combined with the additional safeguards against expense, reduction of quality of facilities, and disruption of service, fully recognizes the Congressional concerns over the protection of life and property. Cox also states that rather than posing any threat to the quality or continuity of services, our rules grant public safety licensees the opportunity to obtain new and substantially improved facilities at no cost to the public safety organizations or the taxpayers. Apple argues that our decision is consistent with Congressional intent because it strikes an appropriate balance among the needs of the parties to this proceeding. It states that our decision fully recognizes the special needs of public safety licensees while ensuring that the efforts to protect these licensees do not thwart the deployment of PCS.

14. American Mobile Satellite Corporation (AMSC), the Personal Communications Industry Association (PCIA) and Apple state that our decision to subject all incumbents 2 GHz facilities, including public safety, to mandatory relocation if an emerging technology provider requires the spectrum is consistent with, and strongly supported by, the record and represents a careful balancing of the interests of all affected parties.[19] AMSC submits that our decision in the *MO&O* is a natural outgrowth of the record and policies under development throughout this proceeding. It further states that our increasing awareness of the difficulty of implementing a spectrum sharing plan was apparent at each stage.

15. Cox and AMSC argue that the *MO&O* sets forth a reasoned analysis that supports the change in policy made therein. Cox states that both its and APC's research studies provide well-documented data regarding spectrum congestion in the emerging technologies bands and the associated impact on the implementation of PCS, particularly in the metropolitan high demand areas. Cox also states that in the Los Angeles Major Trading Area for which it has a pioneer's preference grant, approximately 25 percent of the incumbent 2 GHz microwave facilities appear to be licensed to government entities, including public safety entities. Accordingly, Cox claims that it likely would be unable to deploy PCS in the Los Angeles market if it does not succeed in relocating a significant number of those entities.[20] AMSC and PCIA note that several comments at the PCS task force hearings and petitions for reconsideration of the *Third R&O* argued that the allocated frequencies may prove inadequate for the introduction of PCS because of the public safety exemption.[21]

16. UTAM, Inc. (UTAM) and Apple similarly state that throughout this proceeding and in the related PCS proceeding they have repeatedly argued that PCS and, especially, unlicensed nomadic PCS, cannot share spectrum with fixed microwave facilities.[22] They claim restoring the public safety relocation exemption would impede unlicensed deployment and, if PCS is to flourish, all existing microwave facilities must be subject to relocation.

17. APC submits that our decision to award pioneer's preferences to parties that developed spectrum sharing technologies does not conflict with our decision to subject all existing 2 GHz facilities, including public safety operations, to mandatory relocation if an emerging technology provider requires the spectrum.[23] APC argues that without spectrum sharing technologies, PCS could not operate until all the incumbent fixed microwave facilities had been relocated. APC states that the spectrum sharing technologies that it developed will allow immediate initiation of PCS services with no immediate need to relocate all existing licensees.

18. Several responding parties argue that before we reverse our decision on the public safety exemption, Petitioners should be required to show that public safety will be harmed by relocation.[24] PCIA states that the regulatory framework we have provided, particularly the expanded four-year voluntary and one-year mandatory negotiation periods, ensures that public safety facilities are fully protected. PCIA and AMSC argue that we should not reconsider our mandatory relocation requirements for public safety facilities absent a showing of potential economic or operational harm.[25]

19. In their reply, Petitioners argue that undue reliance has been placed on the needs of unlicensed PCS. They argue that we must analyze the degree to which unlicensed devices can be coordinated with microwave systems and whether there are other bands that may be more appropriate for nomadic devices. They submit that even if there is a basis for requiring relocation of all microwave facilities in the unlicensed portion of the spectrum, nothing in that argument supports the need to relocate facilities from the 120 MHz of spectrum allocated for licensed PCS.[26]

20. *Decision.* We continue to believe that it is in the public interest to subject all incumbent 2 GHz fixed microwave facilities, including public safety licensees, to mandatory relocation if an emerging technology provider requires the spectrum they are using. We are convinced that PCS service may be precluded or severely limited in some areas unless public safety licensees relocate. Of particular concern is providing adequate spectrum for operation of licensed services in major urban areas and for

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17 *Id.* at 19-20.
18 Cox at 8-10 and Apple reply at 2-3.
19 AMSC at 1-6, PCIA at 4, and Apple reply at 2.
20 Cox at 4.
21 AMSC at 5 notes 3, 4, and 5, and PCIA at 5 note 11.
22 UTAM at 4-5, and Apple reply at 1.
23 APC at 1.
24 AMSC at 6 and PCIA at 4.
25 PCIA at 4-6.
26 Petitioners' reply at 10.

operation of unlicensed PCS devices generally. It has been recognized by incumbent fixed microwave and PCS interests alike that it will not be possible for PCS and fixed microwave to operate in the same geographic area on the same frequency without interfering with each other. This decision is supported by the record in this proceeding.[27] Further, this decision, along with the associated transition adopted in previous decisions as modified below, provides a fair balance between the interests of the incumbent fixed microwave service and those services that will use new emerging technologies, such as PCS.

21. The concerns of Congress, as expressed in discussions and correspondence with members of Congress and their staffs and the proposed amendments to the FY 1993 Appropriations Bill as well as those stated in the Omnibus Reconciliation Act of 1993, were carefully considered during our deliberations.[28] As indicated in the Senate amendment cited by Petitioners, the Senate's concerns regarding the relocation of existing 2 GHz licensees were that the communications of all interested fixed microwave operations at 2 GHz, particularly public safety, must be protected; that a new provider must not cause interference to the operations of existing licensees; that we should permit voluntary negotiations between incumbents and new providers; that any mandatory relocation of incumbent commercial facilities not be immediate; that no relocation should adversely impact the fixed service provided or the entity owning that operation; that we should retain jurisdiction to resolve disputes; and that public safety operations should be considered separately and be fully protected, both financially and technically.[29]

22. The Senate amendment was not enacted into law.[30] Nevertheless, the regulatory framework that we have established addresses the concerns expressed during consideration of the FY 1993 Appropriations Bill. Specifically, we will allow the 2 GHz spectrum to be shared by new services and existing services.[31] The rules provide new licensees with access to 2 GHz spectrum within a reasonable timeframe, and at the same time, prevent disruption of existing 2 GHz operations and eliminate any economic impact on existing licensees. In cases where both services cannot share 2 GHz spectrum, the rules protect incumbent operations. A new licensee can require relocation of an incumbent only if it provides the incumbent facilities that are technically equivalent to those being replaced and that fully support the communications requirements of the incumbent. All relocation costs are to be paid by the new licensee. Incumbents will have one year to test their new facilities to ensure that they are equivalent in every respect to their original facilities. If the new system is not equivalent, the licensee may move back to its original facilities and stay there until complete equivalency (or better) is attained. Further, the transition process allows all incumbents to remain in the band for a minimum of three years and certain public safety incumbents for a minimum of five years. This plan fully protects the integrity of all existing public safety operations at 2 GHz.[32]

23. In the *MO&O*, after reconsidering the record, we concluded that in previous decisions we had underestimated the difficulties PCS will experience in permanently sharing spectrum with incumbent fixed microwave licensees.[33] While we indicated that it appears that PCS can be initiated rapidly in most areas on a shared basis with existing operations, we also concluded that in the long term most of the existing 2 GHz operations will have to be relocated to allow PCS to expand. Therefore, on our own motion we decided to subject public safety operations to mandatory relocation.

24. Our decision was made after full opportunity for public comment. The Commission initially proposed "to exempt state and local government 2 GHz fixed microwave facilities from any mandatory transition periods."[34] Many parties, including PSMC, addressed the public safety exemption throughout this proceeding. It was in response to the comments, that the Commission encouraged public safety entities to engage in voluntary negotiations with emerging technology providers users to relocate,[35] and later narrowly defined "public safety" entities.[36] As explained in the subsequent *MO&O*, other comments, including the market studies submitted by APC and Cox, demonstrated that emerging technology providers, particularly with respect to urban areas and unlicensed nomadic devices, would be "precluded or severely limited" unless public safety incumbents relocate.[37] Based on the record amassed in this proceeding, the Commission eliminated the public safety exemption, but provided public safety entities with a longer negotiation period than other incumbent 2 GHz incumbents, in recognition of their previous exempt status as well as the sensitive nature of the communications they provided. Contrary to petitioner's assertion, the fact that the Commission's final rule regarding public safety entities differed from that proposed did not violate APA notice and comment procedural requirements.[38] The Commission's adoption of the final rule was well within the ambit of

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[27] *See MO&O, supra*, at 1947.

[28] Two of the guidelines in the Omnibus Budget Reconciliation Act of 1993, are:

"(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, ... "

See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(a)(3), 107 Stat. 312, 392 (1993); 47 U.S.C. § 309(j)(3).

[29] *See* 138 Cong. Rec. S10346, *supra*.

[30] *See* H.R. Conf. Rep. No. 918, 102d Cong. 2d Sess. (1992); 138 Cong. Rec. S15997 (Oct. 1, 1992)(Statement of Senator Hollings).

[31] *See First R&O, supra*, at 6890-6891.

[32] *See MO&O, supra*, at 1947-1948.

[33] *Id.* at note 4.

[34] w P371XP *See Notice of Proposed Rulemaking*, 7 FCC Rcd at 1542.

[35] *See First Report and Order and Third Notice of Proposed Rulemaking*, 7 FCC Rcd at 6891.

[36] *See Third and Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd at 6610-11.

[37] *Memorandum Opinion and Order* at 1947.

[38] 5 U.S.C. Section 553(b),(c).

issues clearly and unambiguously raised in this proceeding, responded to the comments submitted that addressed the issue, considered the entire record, and represented a reasonable accommodation of the concerns raised therein.[39]

25. In the *MO&O* we concurred with PCS proponents that incumbent public safety facilities must be subject to relocation, particularly in major urban areas, if licensed PCS is to be given a reasonable opportunity to develop, and that all incumbent microwave facilities must be relocated out of the unlicensed spectrum before nomadic unlicensed PCS operations can be implemented. At the same time, our relocation plan provides a reasonable balance and will protect the communications and facilities of all fixed microwave incumbents. Incumbents will be no worse off, and in many cases will be better off if they relocate. Under our plan incumbents are required to relocate only when there is actual, not just theoretical, demand for the spectrum. Therefore, incumbent operations in rural areas may not be required to move for a substantial amount of time, if at all. As indicated above, all incumbent facilities that must relocate will also be provided with systems of equivalent reliability at no cost.[40] In many cases fixed microwave incumbents will gain improved communications capabilities in the relocation process by replacing aged analog equipment. Finally, the protections in our rules ensure that there will be no disruption to the communications of public safety licensees.

26. Our grants of pioneer's preferences to APC and Omnipoint based on their development of sharing technology does not undermine our conclusion that, especially in areas of dense population, long-term sharing of the band may impede the introduction of new technologies and services. We believe that sharing spectrum between incumbents and new licensees may be crucial to the start-up of new services during the initial years while the relocation of existing facilities is being accomplished. The record indicates that in many instances, particularly in the more densely populated urban areas, the ability to share spectrum will be important in the period when incumbents are being relocated.[41] We therefore adopted an approach that encourages sharing and granted PCS pioneers' preferences to APC and Omnipoint for the spectrum sharing technologies they developed. However, we continue to believe that spectrum sharing will be only an interim solution in many areas.

27. In view of the evidence that the introduction of new communications services that will benefit the public could be precluded unless clear spectrum can be obtained, and that relocation can be accomplished reliably, we continue to believe that it is in the public interest to require all incumbents to relocate if their spectrum is required for new services using emerging technologies. Because the requirements of each particular system and operator are different, it is difficult to provide a "bright line" test to ensure that each incumbent licensee fairly receives comparable equipment. Therefore, our rules encourage the parties to negotiate voluntary relocation agreements in which the parties themselves establish the relocation process and requirements that are unique to those parties. We believe that in most instances this voluntary negotiation arrangement will work well.

28. When disputes do arise in relocation negotiations, we believe that they can be resolved best through individual mediation and arbitration efforts rather than adjudication by the Commission. Thus, we emphasize again our intent to use alternative dispute resolution ("ADR") techniques to expedite and improve the relocation process whenever feasible.[42] Resolution of such disputes entirely by our adjudication processes would be time consuming and costly to all parties. Therefore, we continue to encourage parties unable to voluntarily conclude relocation agreements to employ ADR techniques during both the voluntary and mandatory negotiation periods.

29. Nevertheless, we are cognizant of Petitioners' concern that public safety entities with limited resources not be placed in situations in which they would have to accept less favorable terms if disputes arise in the negotiation and relocation process. In considering this issue, in addition to or as a supplement to ADR, we believe an effective way to expedite the negotiation process and minimize the burden on all parties in these situations is to encourage parties to utilize independent, impartial estimates of the costs to relocate the existing operation to a comparable facility. In order to be fair to all parties, the independent estimates would need to include both the specifications for a comparable new facility and the costs associated with providing that facility to the incumbent licensee. We believe that in most cases the availability of the option of choosing to resolve disputes through the use of independent estimates will provide an incentive for both sides in a negotiation to work quickly towards a mutually agreeable solution. In cases in which such estimates are obtained, they will provide a benchmark for an agreement that could avoid the need for the parties bringing the dispute to the Commission. However, where such disputes come before the Commission, we will expect the incumbent to have obtained *bona fide* independent estimates of its relocation costs and to present those estimates to the Commission for consideration.

30. We therefore are modifying the Commission's mandatory relocation procedures to provide for consideration of independent estimates by third parties not associated or otherwise affiliated with either the incumbent licensee or the new service provider. Under this new provision, we will consider independent estimates of the cost of comparable replacement facilities obtained by incumbent licensees in deciding any relocation disputes that are brought before us. We believe that the responsibility for obtaining independent estimates should rest with the incumbent licensee, as it will be in the best position to describe to parties preparing estimates the operating requirements for

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[39] *See Public Service Commission v. FCC*, 906 F.2d 713, 717-18 (D.C. Cir. 1990).

[40] The bands identified in this proceeding for relocation currently support fixed microwave operations over equivalent distances with comparable reliability, including those of public safety operations. *See First R&O*, *supra*, at 6889.

[41] PCIA at 5 and APC at 1.

[42] *See Third R&O*, *supra*, note 51; and *Alternative Dispute Resolution Procedures*, 6 FCC Rcd 5669 (1991).

the new facility.[43] Incumbent licensees are encouraged to present two separately prepared estimates obtained from qualified professional third parties.[44]

31. Independent estimates presented in disputes brought to the Commission for resolution must include a specification for the comparable facility and a statement of costs of providing that facility to the incumbent licensee. The specification should describe the design and technical parameters of the new facility, the equipment to be used in its construction, a statement attesting to the comparability of the proposed new facility to the facility it would replace, and a testing and transition plan. The cost statement should include individual estimates for the design of the new facility, equipment, and testing, as well as the transition. Where the two estimates are substantially different, we expect parties to choose the most reliable and reasonable estimate, average the two estimates, or obtain a third estimate by a mutually agreeable party. If a dispute is brought to us, we will consider the two estimates as evidence of the relocation cost but retain discretion to make our own determination based upon the facts presented to us. In deciding such cases, we intend to be guided by the principle of ensuring that the incumbent is provided a comparable facility at the minimum cost to the new service provider.

32. Public safety licensees are not required to obtain two independent estimates of the cost to relocate with comparable facilities, but we encourage that they do so early in the relocation process. We believe that such estimates will be very helpful in the negotiation process, including those cases that employ ADR techniques. Moreover, having such estimates at our disposal, should Commission intervention become necessary, will expedite a relocation process that is fair to all parties.

33. We also share Petitioners' concern that public safety systems, especially those in rural areas, must have adequate time to negotiate relocation agreements. Previously, we recognized that the demand for the new technology spectrum will vary from market to market and from one area to another and that in some areas, incumbent 2 GHz facilities may not need to relocate as quickly as in areas where spectrum is needed more quickly for emerging technologies.[45] We adopted the bifurcated four-year voluntary/one-year mandatory negotiation period to accommodate these variations in demand. However, we agree with Petitioners that public safety licensees may need more than one year to negotiate agreements where the negotiations do not start until sometime after the voluntary period has expired. Accordingly, we are modifying the relocation plan to extend the mandatory negotiation period for public safety facilities to two years. We do not, however, believe it would serve the public interest in implementing broadband PCS to extend to six years the current five year period of protection for public safety facilities. As stated previously, our primary goal in this proceeding is to provide usable spectrum for the implementation of emerging technologies in an expeditious manner. We therefore are maintaining the current five year period for public safety facilities by shortening the four year voluntary period to three years. The relocation plan for public safety facilities will thus provide a three year period for voluntary negotiations followed by a two year period for mandatory negotiations. This will provide applicable public safety entities, especially those with facilities in rural areas, ample time to negotiate and conclude agreements.[46]

PROCEDURAL MATTERS

34. *Ordering Clauses.* Accordingly, IT IS ORDERED, that the petition for reconsideration filed jointly by the Public Safety Microwave Committee, the Association of Public-Safety Communications Officials-International, Inc., the County of Los Angeles, and the Forestry-Conservation Communication Association IS GRANTED to the extent described above and IS DENIED in all other respects. Further, IT IS ORDERED, that Part 94 of the Commission's Rules and Regulations IS AMENDED as specified in the Appendix, effective 30 days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 7(a), 303(c), 303(g), and 303(r), of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(c), 303(g), and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix: Final Rules

I. Title 47 of the Code of Federal Regulations, Part 94, is amended as follows:

PART 94 - PRIVATE OPERATIONAL-FIXED MICROWAVE SERVICE

1. The authority citation in Part 94 continues to read:

AUTHORITY: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. Subpart C is amended by revising Sections 94.59(b) and 94.59(f) to read as follows:

§ 94.59 Transition of the 1.85-1.99, 2.13-2.15, and 2.18-2.20 GHz bands from Private Operational-Fixed Microwave Service to emerging technologies.

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[43] We utilize a similar requirement for third party appraisals with regard to broadcast distress sales. *See, e.g. Northland Television Inc.*, 72 FCC 2d 51,56 (1979).

[44] We will consider the cost of obtaining the estimates as part of the cost of relocation and therefore recoverable from the new service provider.

[45] *See Third R&O, supra,* at 6594-6601.

[46] As an added safeguard, this five-year period will apply to all public safety facilities, that is, those in spectrum allocated for licensed services and in spectrum allocated for unlicensed devices. As is the case with other fixed microwave incumbents, the voluntary period will start with our acceptance of applications from emerging technology providers and the mandatory period starts any time after the voluntary period expires and the emerging technology provider initiates discussions with a particular incumbent.

* * * * *

(b) Private Operational-Fixed Microwave Service licensees, with the exception of public safety facilities defined in paragraph (f) of this section, in bands allocated for licensed emerging technology services will maintain primary status in these bands until two years after the Commission commences acceptance of applications for an emerging technology service (two-year voluntary negotiation period), and until one year after an emerging technology service licensee initiates negotiations for relocation of the fixed microwave licensee's operations (one-year mandatory negotiation period) or, in bands allocated for unlicensed emerging technology services, until one year after an emerging technology unlicensed equipment supplier or representative initiates negotiations for relocation of the fixed microwave licensee's operations (one-year mandatory negotiation period). When it is necessary for an emerging technology provider or representative of unlicensed device manufacturers to negotiate with a fixed microwave licensee with operations in spectrum adjacent to that of the emerging technology provider, the transition schedule of the entity requesting the move will apply. Public safety facilities defined in paragraph (f) of this section will maintain primary status in these bands until three years after the Commission commences acceptance of applications for an emerging technology service (three-year voluntary negotiation period), and until two years after an emerging technology service licensee or an emerging technology unlicensed equipment supplier or representative initiates negotiations for relocation of the fixed microwave licensee's operations (two-year mandatory negotiation period).

* * * * *

(f) Public safety facilities subject to the three-year voluntary and two-year mandatory negotiation periods, are those in which the majority of communications carried are used for police, fire, or emergency medical services operations involving safety of life and property. The facilities within this exception are those Part 94 facilities currently licensed on a primary basis pursuant to the eligibility requirements of Section 90.19, Police Radio Service; Section 90.21, Fire Radio Service; Section 90.27, Emergency Medical Radio Service; and Subpart C of Part 90, Special Emergency Radio Services. Licensees of other Part 94 facilities licensed on a primary basis under the eligibility requirements of Part 90, Subparts B and C, are permitted to request similar treatment upon demonstrating that the majority of the communications carried on those facilities are used for operations involving safety of life and property.

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SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, Second Memorandum Opinion and Order (ET Docket No. 92-9)

Pursuant to this Second Memorandum Opinion and Order, we are amending the negotiation procedures for mandatory relocation of existing microwave facilities and modifying the relocation plan for public safety facilities. I write separately to reiterate my concern that the five year relocation plan not impede their ability to operate or to serve the public in any way.

I am pleased that the Commission has incorporated numerous safeguards to ensure that public safety facilities placed at a disadvantage during the negotiation and relocation processes. Moreover, the Commission has recognized the need for these facilities to have adequate time to negotiate relocation agreements by extending the mandatory negotiation period from one (1) to two (2) years. While these changes demonstrate a certain measure of flexibility and sensitivity to their concerns, the fact remains that public safety facilities will still have five (5) years within which to relocate. To that end, I hope that the Commission continues to monitor the negotiation and relocation process to make certain no disruption to public safety operations results from our requirements.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-314

In the Matter of

Amendment of	PP-4, PP-16, PP-42,
the Commission's	PP-45, PP-51, PP-54,
Rules to Establish	PP-68, PP-73
New Personal	
Communications Services	

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1994; Released: December 2, 1994

By the Commission: Chairman Hundt and Commissioner Chong not participating.

TABLE OF CONTENTS

	Paragraph
I. INTRODUCTION	1
II. BACKGROUND	2 - 6
III. PETITIONS FOR RECONSIDERATION	7 - 39
Advanced Cordless Technologies, Inc (PP-4)	7
Advanced MobileComm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc. (PP-42).	8 - 14
Ameritech (PP-45)	15 - 17
Corporate Technology Partners (PP-51)	18
Nextel Communications, Inc. (PP-54)	19 - 27
Personal Communications Network Services of New York, Inc. (PP-16)	28 - 30
Qualcomm Incorporated (PP-68)	31 - 35
Spatial Communications Inc. (PP-73)	36 - 39
IV. ORDERING CLAUSE	40

INTRODUCTION

1. By this action, the Commission addresses eight petitions for reconsideration of the *Third Report and Order* (*Third R&O*) in this proceeding.[1] Specifically, we affirm our denials of pioneer's preferences to petitioners. The recent passage of legislation regarding the General Agreement on Tariffs and Trade (GATT)[2] rendered moot any further Commission action on the three 2 GHz broadband personal communications services (PCS) pioneer's preferences granted in the *Third R&O*. Accordingly, we are not addressing those portions of the petitions that pertain to the grants and the petitions will be dismissed in part for this reason.

BACKGROUND

2. The Commission's pioneer's preference rules provide a means of extending preferential treatment in its licensing process to parties that demonstrate their responsibility for developing new communications services and technologies.[3] These rules are intended to foster develop-

[1] *See* Establishment of New Personal Communications Services, *Third Report and Order*, GEN Docket No. 90-314, 9 FCC Rcd 1337 (1994), *appeals remanded sub nom. Pacific Bell v. FCC*, No. 94-1148 (D.C. Cir., July 26, 1994, remanded). *See also Memorandum Opinion and Order on Remand*, ET Docket No. 93-266 and GEN Docket No. 90-314, 9 FCC Rcd 4055 (1994); *appeal pending sub nom. American Personal Communications v. FCC*, No. 94-1549 (D.C. Cir. filed August 10, 1994). The petitions for reconsideration were filed by Advanced Cordless Technologies, Inc. (ACT); Advanced MobileComm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc. (AMT/DSST); Ameritech; Corporate Technology Partners (CTP); Nextel Communications, Inc. (Nextel); Personal Communications Network Services of New York, Inc. (PCNS-NY); Qualcomm Incorporated (Qualcomm); and Spatial Communications Inc. (SCI).

[2] Congress completed passage of the GATT legislation on December 1. The President has made clear that he intends to sign the legislation. *See* Uruguay Round Agreements Act, H.R. 5110 and S. 2467, 103d Cong., 2d Sess. title VIII (1994).

[3] The pioneer's preference regulations are codified at 47 C.F.R. §§ 1.402, 1.403, 5.207 (1993). *See* Establishment of Procedures to Provide a Preference, *Report and Order*, 6 FCC Rcd 3488 (1991) (*Pioneer's Preference Report and Order)*; recon. granted in part, *Memorandum Opinion and Order*, 7 FCC Rcd 1808 (1992) (*Pioneer's Preference Recon. Order)*; further recon. denied, *Memorandum Opinion and Order*, 8 FCC Rcd 1659 (1993) (*Pioneer's Preference Further Recon. Order)*. We are reviewing our pioneer's preference rules to assess the effect of Congressional authority to assign licenses by competitive bidding, *see* Review of the Pioneer's Preference Rules, ET Docket No. 93-266, *Notice of Proposed Rule Making*, 8 FCC Rcd 7692 (1993); *First Report and Order*, 9 FCC Rcd 605 (1994), *on remand, on recon Memorandum Opinion and Order*, FCC 94-276, released October 24, 1994. In our most recent decision, we required that recipients of pioneer's preferences in proceedings in which tentative decisions on preference requests had been made at the time Congress enacted auction legislation pay for their licenses. This decision applies to three proceedings -- broadband PCS (GEN Docket No. 90-314); 28 GHz local multipoint distribution service (CC Docket No. 92-297); and low-Earth orbit satellites above 1 GHz (ET Docket No. 92-28). With respect to broadband PCS -- the only one of the three proceedings in which a final pioneer's preference decision has been made -- we required that pioneers, who will receive Channel Block A (1850-1865 and 1930-1945 MHz bands) in a Major Trading Area (MTA), *see* note 15 *infra*, pay either 90 percent of the winning competitive bid for Channel Block B (1870-1885 and 1950-1965 MHz bands) in their MTA or 90 percent of the adjusted value of the license, calculated based upon the average per population price established by competitive bidding for Channel Blocks A and B in the top ten MTAs. *See Memorandum Opinion and Order on Remand, supra* note 1. The GATT legislation changed the payment formula to 85 percent of the adjusted value of the license, calculated based upon the average per population price estab-

ment of new services and improve existing services by reducing the delays and risks innovators otherwise would face with the Commission's licensing process.

3. We do not grant preferences casually; indeed, we have stated that: "An applicant for a pioneer's preference [has] a significant burden to persuade the Commission that its proposal has sufficient merit."[4] The purpose of our pioneer's preference rules is to encourage the development of new technologies and services, rather than merely to implement existing technologies in different bands. Accordingly, our rules require that an entity must show that its innovative technology was developed specifically for the advancement of a particular service, in conjunction with a particular rule making before the Commission addressing this service.[5] Otherwise, an entity that had developed a technology useful in a variety of different services would be eligible for a preference in any new service established by the Commission. We believe that allowing such blanket eligibility for preferences would defeat the intent of our rules.

4. To be granted a pioneer's preference, therefore, an applicant must demonstrate that it has developed a new service or technology; that is, that it has developed the capabilities or possibilities of the service or technology or has brought the service or technology to a more advanced or effective state.[6] The applicant also must demonstrate the technical feasibility of the new service or technology, either by submitting a technical feasibility showing or having submitted at least preliminary results of an experiment. Finally, a preference will be granted only if the rules adopted are a reasonable outgrowth of the proposal and lend themselves to grant of a preference.[7] In the *Pioneer's Preference Report and Order,* we stated: "[I]t will be our general policy to award a preference to any otherwise qualified innovator meeting our standard even if the Commission's final rules for the service are not identical to the innovator's original proposal. However, if the modifications are so significant that the particular innovator does not meet the eligibility standard, we will not award a preference to that innovator." We further stated that "any pioneer's preference would become final (and its scope determined) if final rules are adopted that are generally similar to the innovator's proposal."[8] An applicant meeting the pioneer's preference standard will be placed on a pioneer's preference track, will not be subject to competing applications, and if otherwise qualified will receive a license. Other applicants will compete for additional licenses on a separate track.[9]

5. The first pioneer's preference was awarded to Volunteers in Technical Assistance (VITA) for having developed and demonstrated the feasibility of using a low-Earth orbit satellite system on VHF/UHF frequencies for civilian digital message communications purposes.[10] The second award was made to Mobile Telecommunication Technologies Corporation (Mtel) for developing and testing an innovative new 900 MHz narrowband PCS technology that will increase spectrum efficiency.[11]

6. In this proceeding, we received pioneer's preference requests related to broadband PCS from 89 applicants, of which 50 were accepted for consideration.[12] In October 1992, we tentatively found that American Personal Communications (APC), Cox Enterprises, Inc. (Cox), and Omnipoint Communications, Inc. (Omnipoint) merited preferences and that the remaining 47 requests relating to broadband PCS tentatively did not merit preferences.[13] In December 1993, in the *Third R&O,* we concluded that APC, Cox, and Omnipoint (Grantees) met the pioneer's preference standard and therefore merited award of preferences, and that the remaining requests did not meet this standard and therefore did not merit award of preferences.[14] APC was granted a preference for having developed and demonstrated technologies that facilitate spectrum sharing by mobile PCS and fixed microwave systems at 2 GHz; Cox was granted a preference for having developed and demonstrated the feasibility of innovatively using cable television facilities as part of the PCS infrastructure; and Omnipoint was granted a preference for having designed and manufactured a 2 GHz spread spectrum handset and associated base station equipment.[15]

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lished by competitive bidding for Channel Blocks A and B in the twenty largest MTAs that do not include MTAs awarded to pioneers. This legislation mooted any challenges to the grants made and the payment required.

[4] *Pioneer's Preference Report and Order, supra* note 3 at para. 48.

[5] *Id.* at para. 37.

[6] Our rules require that the new service or technology already be developed in a concrete, demonstrated fashion. Promises of future development are insufficient. [*See Adams Telcom, Inc. v. FCC,* Slip Op., No. 93-1103 (D.C. Cir. October 28, 1994).]

[7] *See* 47 C.F.R. § 1.402.

[8] *See Pioneer's Preference Report and Order, supra* note 3, 6 FCC Rcd at 3495, 3497.

[9] *See Pioneer's Preference Further Recon. Order, supra* note 3, 8 FCC Rcd at 1659.

[10] *See* Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum for Fixed and Mobile Satellite Services for Low-Earth Orbit Satellites, *Report and Order,* ET Docket No. 91-280, 8 FCC Rcd 1812 (1993) (award to VITA).

[11] *See First Report and Order* (*First R&O*), GEN Docket No. 90-314 and ET Docket No. 92-100, 8 FCC Rcd 7162 (1993), *on recon. Memorandum Opinion and Order,* 9 FCC Rcd 1309 (1994) (award to Mtel), *further recon., Second Memorandum Opinion and Order,* 9 FCC Rcd 4519 (1994), *appeals pending sub nom. BellSouth Corp. v. FCC,* No. 93-1518 (D.C. Cir. filed August 20, 1993).

[12] The other 39 requests related to broadband PCS were incomplete and dismissed for failing to provide basic information required by the Commission's rules. Several of these dismissals were appealed and the Commission's staff decision was affirmed. *See Adams Telcom, Inc. v. FCC, supra* note 6.

[13] *See Tentative Decision and Memorandum Opinion and Order* (*Tentative Decision*), GEN Docket No. 90-314, 7 FCC Rcd 7794, 7809-13 (1992), Six pioneer's requests relating to 900 MHz narrowband PCS also were tentatively denied in the *Tentative Decision.* These six requests were denied in the *First R&O* in GEN Docket No. 90-314 and ET Docket No. 92-100, *supra* note 11.

[14] *See Third R&O, supra* note 1, 9 FCC Rcd at 1339.

[15] As a result of receiving pioneer's preferences, APC, Cox, and Omnipoint will not be subject to competing license applications within Channel Block A in their designated MTAs. Specifically, if otherwise qualified, APC will receive Channel Block A in the Washington-Baltimore MTA; Cox will receive Channel Block A in the Los Angeles-San Diego MTA; and Omnipoint will receive Channel Block A in the New York MTA. To ensure the integrity of our pioneer's preference policies, we directed the relevant licensing bureau to condition each broadband PCS license

PETITIONS FOR RECONSIDERATION

Advanced Cordless Technologies, Inc (PP-4)

7. In its petition for reconsideration filed on March 7, 1994, ACT requests that we reconsider the *Third R&O* "insofar as the Commission there . . . failed to award a pioneer's preference to ACT."[16] The decision to deny ACT's 900 MHz PCS pioneer's preference request was made in the *First R&O* (released July 23, 1993), not in the *Third R&O*.[17] Other 900 MHz PCS pioneer's preference requests were also decided in the *First R&O*.[18] On November 22, 1993, ACT filed a petition for reconsideration of the *First R&O* "insofar as the Commission there denied ACT's request for a pioneer's preference."[19] On March 4, 1994, the Commission dismissed that petition as late-filed, and no appeal was taken.[20] There is no decision with respect to ACT's pioneer's preference request in the *Third R&O* now under reconsideration. Thus, ACT's instant March 7, 1994 petition is merely again seeking reconsideration of the denial of its preference in the *First R&O*. Under Section 405 of the Communications Act , 47 U.S.C. § 405, such petitions were due on or before September 10, 1993, which was 30 days after Federal Register publication. *See* 47 C.F.R. 1.4 (b). The petition is thus five months late. We have no discretion to accept the subject late-filed petition as it relates to decisions made in the *First R&O*.[21] Accordingly, insofar as the petition requests reconsideration of the denial of a pioneer's preference to ACT, it will be dismissed as untimely. Insofar as ACT's petition relates to the pioneer's preference grants made in the *Third R&O*, it will be dismissed as moot.

Advanced MobileComm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc. (PP-42)

8. In their joint petition for reconsideration, AMT/DSST claim that the Commission erred in its conclusions regarding the compatibility of their proposed spectrum scheme with the plan adopted in the *Second Report and Order (Second R&O)* in this proceeding,[22] and regarding an AMT/DSST demonstration of the technical feasibility of their broadband PCS equipment. In their jointly filed pioneer's preference request, AMT/DSST claimed to have demonstrated that their proposed "open network architecture" (ONA) scheme would work within a 10, 20, or 30 MHz bandwidth. Under this scheme, a licensee would build and operate a broadband PCS service in a portion of its spectrum and be required to offer the remaining spectrum to other operators, in a manner similar to a "carrier's carrier" approach. Access to this remaining spectrum would be on a first-come, first served demand basis for all parties including the licensee, provided that the demand for its services exceeded its exclusive spectrum. Under this proposal a licensee would be assigned a spectrum block of, for example, 30 MHz. The licensee would be required to operate and build a system that operated on 5 MHz. On the remaining 25 MHz, the licensee would be required to build and make facilities available to other PCS providers on an unbundled, non-discriminatory contractual basis.

9. In the *Tentative Decision*, we tentatively denied AMT/DSST's request because: 1) AMT had just begun to initiate preliminary tests of British equipment and DSST had performed only computer simulations and spectrum studies, and neither party had developed 2 GHz PCS technology to the point of field testing; and 2) the regulatory scheme proposed in the *Notice of Proposed Rule Making and Tentative Decision (NPRM-TD)* in GEN Docket No. 90-314 and ET Docket No. 92-100, 7 FCC Rcd 5676 (1992), was substantially different from the AMT/DSST open entry architecture proposal. In comments to the *Tentative Decision* AMT and DSST asserted that they had commercially available spread spectrum equipment that operates in the 900 MHz, 2.4 GHz, and 5.7 GHz Industrial, Scientific, and Medical (ISM) bands. DSST indicated that it was still developing its synchronous code division multiple access (S-CDMA) technology that would operate in the 2 GHz band, but stated that the technology would be similar to that being commercially used at 900 MHz and 2.4 GHz. AMT and DSST also asserted that their open entry proposal was compatible with the plan proposed in the *NPRM-TD*. They contended that S-CDMA would function well within other licensing regimes and that the Commission was penalizing them because they requested a 5 megahertz frequency assignment rather than a 30 megahertz assignment.

10. In the *Second R&O*, we did not adopt an open architecture spectrum plan, but instead adopted a plan with only one license per spectrum block per service area. In the *Third R&O*, we found AMT/DSST's open architecture proposal incompatible with the adopted rules and further found that AMT/DSST had not demonstrated the technical feasibility of their proposed equipment or made significant modifications to their technology to provide PCS at 2 GHz since the *Tentative Decision*. Accordingly, we denied AMT/DSST's pioneer's preference request.

11. In their petition for reconsideration, AMT/DSST argue that the Commission erred in its conclusion regarding the compatibility of their proposal with the adopted 2 GHz broadband spectrum plan, stating that their open network

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obtained through the pioneer's preference process upon the licensee building a system that substantially uses the design and technologies upon which its preference award is based. We stated that this condition would apply in the service area for which the preference was granted and for the initial required five year build-out period specified in the rules for broadband PCS adopted in this docket. Additionally, we required the licensing bureau to condition the grant of broadband PCS licenses awarded under our pioneer's preference rules on the licensee holding the license for a minimum of three years or until the construction requirements applicable to the five-year build-out period have been satisfied, whichever is earlier. *See Third R&O, supra* note 1. p

[16] ACT Petition at 1.

[17] *See First R&O, supra* note 11, 8 FCC Rcd at 7176 ("We deny ACT's pioneer's preference request for the reasons stated."); *see also* 58 Fed. Reg. 42681, 42683 (August 11, 1993).

[18] *Id.* at 7175-84; *see* note 13, *supra*.

[19] ACT Petition for Reconsideration at 1 (filed November 22, 1993).

[20] *See Memorandum Opinion and Order, supra* note 11, 9 FCC Rcd 1309, 1317 (1994).

[21] *See Virgin Islands Telephone Corp. v. FCC*, 989 F. 2d 1231 (D.C. Cir. 1993); *Reuters Ltd. v. FCC* , 781 F.2d 946 (D.C. Cir. 1986); *Mary Kupris*, 5 FCC Rcd 5142 (1990) (subsequent history omitted).

[22] *See* 8 FCC Rcd 7700 (1993). The *Memorandum Opinion and Order (MO&O)* in this proceeding modified the spectrum plan adopted in the *Second R&O; see* 9 FCC Rcd 5947 (1994).

architecture is compatible with the plan. Additionally, they argue that in the *Third R&O* the Commission erroneously elevated field testing of broadband PCS equipment to a separate pioneer's preference criterion of decisional significance. Finally, AMT/DSST argue that they have demonstrated the technical feasibility of their proposal, citing the work of DSST's parent company, Cylink, with commercial ISM equipment that uses spread spectrum technology.

12. We reaffirm our finding that AMT/DSST's proposal to require ONA is incompatible with our adopted 2 GHz broadband PCS rules. Their proposal requires a specific set-aside of designated spectrum for open network architecture that we declined to adopt either in the *Second R&O* or on reconsideration.[23] While voluntary resale agreements or joint ventures are permissible to facilitate parties' access to spectrum, the Commission prohibited the disaggregation of spectrum blocks and found that the record was inadequate to support the complex technical and operational issues involved in developing ONA for broadband PCS. Broadband PCS licensees in blocks A, B, and C are entitled to operate in the entire 30 megahertz allocated under current rules and AMT/DSST's proposal is thus incompatible with the plan adopted by the Commission.

13. Further, in the *Third R&O* we found that AMT/DSST had not demonstrated technical feasibility. AMT/DSST are incorrect in stating that we have elevated field testing to a separate pioneer's preference criterion of decisional significance. The *Tentative Decision* and *Third R&O* made clear that AMT/DSST's preliminary tests that employed existing British equipment, computer simulations, and spectrum studies were inadequate to show technical feasibility. The Commission, in its *Tentative Decision,* suggested that field testing might be a way to supplement AMT/DSST's preliminary tests that were inadequate in this case to demonstrate technical feasibility. We did not establish field testing as a separate pioneer's preference criterion.[24]

14. With respect to AMT/DSST's argument that the development of commercial ISM spread spectrum equipment by DSST's parent Cylink is evidence of the technical feasibility of their proposed broadband PCS equipment, we find this argument inconsistent with their previous assertions that they were developing new broadband PCS equipment.[25] Cylink's ISM spread spectrum equipment does not pertain to broadband PCS. Therefore, if AMT/DSST's proposed system is based on Cylink's equipment, it does not qualify as an innovation worthy of a broadband PCS pioneer's preference. Accordingly, we affirm our decision to deny AMT/DSST's pioneer's preference request.

Ameritech (PP-45)

15. In its petition for reconsideration, Ameritech argues that it satisfied all of the requirements for a pioneer's preference award in its preference request and that its request and experimental trial demonstrate a level of innovation equal to or greater than that shown by the three broadband PCS preference recipients. In its pioneer's preference request, Ameritech stated that its broadband PCS trial was based upon a unique open network interface between the Public Switched Telephone Network (PSTN) and a broadband PCS provider. Ameritech argues that this interface demonstrates innovation because it is independent of transmission technology, employs intelligent handset/base station interaction, and offers the provider a range of features to offer their customers. In its petition for reconsideration, Ameritech states that it is scheduled to receive a U.S. patent for this interface, and that the forthcoming grant of the patent contradicts the Commission's conclusion that "Ameritech has not demonstrated how its ... development of an open network interface differs from the capabilities of the existing PSTN."[26]

16. In the *Third R&O,* we denied Ameritech's request for a pioneer's preference based upon our conclusion that Ameritech had demonstrated neither the employment of other than existing technology for its system nor its responsibility for a specific innovation. Essentially, we found that Ameritech had not justified its claim of having developed innovations. In its petition for reconsideration, Ameritech fails to provide any new information that contradicts the Commission's original conclusions. Regarding Ameritech's statement that its innovation is comparable to that of the Grantees, we note that APC, Cox, and Omnipoint each clearly demonstrated what is new and innovative about their respective proposals, provided technical details, and documented experiments demonstrating the innovativeness of their technologies, whereas Ameritech did not provide such details. The Commission does not simply accept Ameritech's conclusory statement that its innovation is comparable to those receiving a preference. Rather, Ameritech must clearly demonstrate the details of the innovation.

17. That Ameritech may receive a U.S. patent for its open network architecture interface in itself does not qualify for a pioneer's preference.[27] Broadband PCS systems are likely to vary widely, and each may have unique components that are patentable; however, our decisions to award pioneer's preferences are based upon showings of substantial innovation and complete system design. We addressed the relevance of patents in the *Pioneer's Preference Report and Order* establishing the pioneer's preference rules, where we stated that "while portions of a broad-based radio service may be patentable, including both equipment and specific services, such as call protocols, the entire broad-based service would not be."[28] Whether or not Ameritech warrants a patent is not dispositive of whether under our rules it merits a pioneer's preference for having developed a technically feasible new service or technology. By contrast, the achievements of APC, Cox, and Omnipoint were overall broadband PCS system innovations. Accordingly, we deny Ameritech's petition for reconsideration.

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[23] *See MO&O, supra* note 22 at para. 69. *See also, Third Memorandum Opinion and Order,* GEN Docket No. 90-314, FCC 94-265 at para. 90, released October 19, 1994.

[24] *See Third R&O, supra* note 1, at para. 166.

[25] In the *Third R&O,* we did not deny AMT/DSST's request based on Cylink's previous work because the request indicated that AMT/DSST were developing new technology specifically for broadband PCS.

[26] *See Third R&O, supra* note 1, 9 FCC Rcd at 1360.

[27] We note that no patent has yet been awarded.

[28] *Pioneer's Preference Report and Order, supra* note 3, 6 FCC Rcd at 3490.

Corporate Technology Partners (PP-51)

18. We find CTP's petition for reconsideration deficient on procedural grounds because it was not filed with the Commission's Office of the Secretary until April 7, 1994, eight days after the statutory filing deadline in this proceeding. CTP subsequently filed a Motion for Acceptance of its petition, which presented its reason for failure timely to file; however, in accordance with 47 U.S.C. § 405, we lack discretion to accept the petition.[29] Accordingly, CTP's petition is dismissed.

Nextel Communications, Inc. (PP-54)

19. In its petition for reconsideration, Nextel argues that it warrants a pioneer's preference for its Digital Mobile technology. In its pioneer's preference request, Nextel proposed to use this technology to provide voice and data services using low-power base stations and handsets. It claimed that Digital Mobile technology provides six times the capacity of analog technology on a 25 kilohertz frequency, and is capable of increasing Specialized Mobile Radio capacity by at least 15 times. It contended that this technology represents advances in system capacity, power control for mobile and handheld units, frequency agility, subscriber assisted handoff, integration of disparate services, and seamless infrastructure. Further, Nextel argued that while the initial development and implementation of this technology is in the Enhanced Specialized Mobile Radio (ESMR) service, its full realization can be achieved in the broadband PCS service.

20. In its petition for reconsideration, Nextel asserts that the Commission's decision denying its pioneer's preference request was both arbitrary and internally inconsistent. It asserts that the Commission has inconsistently applied the pioneer's preference rules and has ignored the existence of Nextel's operating system, which demonstrates that Digital Mobile technology is both feasible and innovative and therefore merits a pioneer's preference. According to Nextel, the Commission found that Nextel did not propose specific PCS services, while stating that Nextel's proposed services are similar to those of other broadband PCS pioneer's preference applicants.

21. In the *Third R&O*, we found that Nextel's preference request described the technology and services it had designed and implemented within the ESMR service. We stated that Nextel had not explained or otherwise demonstrated how it planned to use Digital Mobile technology for broadband PCS in ways different from ESMR, or how its technology would result in different services. We stated that merely transferring essentially the same technology and infrastructure from 800 MHz to 2 GHz would not qualify Nextel for a broadband pioneer's preference.

22. Nextel argues that its Digital Mobile technology permits a customized integration of wireless communications services that can share spectrum with incumbent microwave operations. It contends that the Commission cannot legitimately grant APC a preference for its Frequency Agile Sharing Technology (FAST) without granting Nextel a preference for Digital Mobile technology, because the two technologies accomplish the same result. While Nextel concedes that Digital Mobile technology has been employed only at 800 MHz, it cites Bell Atlantic's contention that the basic principles of operation for a wireless communications system are the same at 2 GHz as at 800 MHz.[30] Nextel further argues that FAST has been used only in limited experimental trials, whereas Digital Mobile has been used commercially, and that Nextel's experience with Digital Mobile offers the primary evidence supporting the Commission's adoption of 10 MHz PCS channel assignments in the *Second R&O*.

23. Finally, Nextel asserts that denial of its request is inconsistent with the Commission's 1991 *Waiver Order*, which granted Fleet Call, Inc. a waiver of the Commission's construction requirements for its proposed wide-area SMR system.[31] Nextel argues that the *Third R&O* 's finding that the *Waiver Order* is inapplicable to the instant proceeding is at odds with the *Waiver Order* 's language, which stated that Digital Mobile technology is innovative and falls within Section 303 of the Communications Act, which directs the Commission to promote new uses of radio.

24. Nextel's claim that we have inconsistently applied our pioneer's preference rules and ignored evidence demonstrating that Nextel's Digital Mobile technology merits a preference is incorrect. Our initial evaluation of Nextel's request found that Nextel developed Digital Mobile technology for implementation of 800 MHz SMR services; after reviewing the record, including the existence of Nextel's operating system, we reaffirm this analysis. Although Digital Mobile technology may be used for broadband PCS, Nextel has failed to demonstrate any aspects of innovative technology that were developed for or that have unique relevance to 2 GHz broadband PCS. Further, the services that Nextel proposes for broadband PCS are similar to those it is already providing in SMR spectrum. Consequently, Nextel has not demonstrated that it has developed a new service or significantly enhanced an existing service, and merely relocating an existing service does not qualify as an innovation.

25. We also reject Nextel's assertion that its proposed services are a customized integration of wireless communications services that permit sharing similar to APC's proposed PCS system. While APC's system was designed for 2 GHz PCS and was extensively tested in the 2 GHz band, Nextel's system was not. Nextel's system was designed and is used commercially in the 800 MHz SMR band; however, the propagation and sharing environments are significantly different in the 2 GHz band. In particular, Nextel has operated in a mobile environment at 800 MHz, whereas APC has specifically customized its system to operate in a fixed microwave environment at 2 GHz.

26. Further, in considering Nextel's argument that its experience with Digital Mobile technology constitutes the primary evidence supporting adoption of 10 MHz PCS channel assignments, the record does not support this assertion. It is true that Nextel's experience with narrowband channels was cited in the *Second R&O;* so was the experience of other entities that did not receive a pioneer's

[29] *See* note 21, *supra*.
[30] *See* Nextel Petition at 8.
[31] *See Waiver Order*, 6 FCC Rcd 1533; *recon. denied*. 6 FCC Rcd 6989 (1991). Fleet Call was Nextel's former name.

preference.[32] It was a combination of factors, not merely Nextel's experience, that led to the adoption of 10 MHz channels.[33]

27. Finally, while we found in the *Waiver Order* that Nextel's enhancements to SMR were innovative when compared to existing services, that finding was made three years ago and not pursuant to the standards developed specifically for pioneer's preferences. Nextel's broadband PCS proposal neither enhances its now existing SMR service nor proposes to apply it in an innovative manner to the 2 GHz band. Accordingly, for the above reasons, we deny Nextel's petition for reconsideration.

Personal Communications Network Services of New York, Inc. (PP-16)

28. In its petition for reconsideration, PCNS-NY requests that the Commission correct the *Third R&O*, as published in the *FCC Record*, by eliminating a reference to an opposition to its pioneer's preference request."[34] Prior to publication of the *Third R&O* in the *FCC Record*, the Commission released a version of the *Third R&O* that cited comments filed by Cox opposing PCNS-NY's pioneer's preference request. This version of the *Third R&O* failed to recognize that Cox had later filed a Request for Partial Dismissal of Opposition, which stated that Cox took no position on the merits of PCNS-NY's pioneer's preference request.[35] Accordingly, on March 14, 1994, the Commission's Chief Engineer issued an *Erratum* that noted Cox's Request for Partial Dismissal of Opposition.[36]

29. PCNS-NY contends that the *Erratum* fails adequately to correct the record because the *Third R&O* continues to cite Cox's original opposition to PCNS-NY's pioneer's preference request. PCNS-NY maintains that its reputation is undermined by the *Third R&O*'s reference to Cox's initial opposition to PCNS-NY's preference request. PCNS-NY argues that it has spent millions of dollars in experimenting with broadband PCS, and the Commission's failure to eliminate the reference to Cox's initial opposition distorts PCNS-NY's contribution.

30. We disagree that the corrected *Third R&O* (as published in the *FCC Record)* is unfair to PCNS-NY. The corrected *Third R&O* sets forth the history of Cox's comments and makes clear that Cox's initial opposition to PCNS-NY's preference request was withdrawn. We see no reason why setting forth an accurate history should have a deleterious effect on PCNS-NY's reputation. Accordingly, we deny PCNS-NY's petition for reconsideration.

Qualcomm Incorporated (PP-68)

31. In its petition for reconsideration, Qualcomm asks that we grant its pioneer's preference request. Qualcomm claims that it has satisfied the Commission's pioneer's preference criteria and argues that our explanations for denial are confusing, inconsistent, and contradictory.

32. Qualcomm sought a preference for its development of a digital voice and data system using CDMA technology in 1.25 MHz channels.[37] It asserted that it was a pioneer in the development of advanced coding and signal processing subsystems, power control systems, and an advanced receiver. In the *Third R&O,* we found that Qualcomm had experimented with and proposed only three features specifically for broadband PCS: exclusion zones around microwave towers; the use of smaller cells; and the development of remote antennas. We concluded that each of these concepts had previously been developed by others. We also concluded that Qualcomm's narrowband CDMA system was essentially identical to the system which it already had developed for implementation of its 800 MHz digital cellular system. We therefore denied Qualcomm's pioneer's preference request.

33. In its petition for reconsideration, Qualcomm maintains that it is responsible for four baseband engineering developments, namely, coding and signal processing subsystems that incorporate spread spectrum wave form design, a power control system, a sophisticated handoff system, and an advanced receiver. It argues that the Commission is incorrect in concluding that it developed its CDMA technology for 800 MHz cellular operations. Qualcomm argues that cellular is only one application of its technology. It states that it began developing its CDMA technology in 1985 for satellite communications, but later realized that its technology could provide a variety of wireless communications such as cellular, wireless local loop, and broadband PCS. In addition, Qualcomm claims that it has demonstrated the technical feasibility of its system and that this claim is supported by other experiments, such as that of APC. Finally, Qualcomm argues that the rules adopted by the Commission are a reasonable outgrowth of Qualcomm's innovative work.

34. We repeat that the purpose of our pioneer's preference rules is to encourage the development of new technologies and services, rather than merely to implement existing technologies and services in different bands. Accordingly, our rules require that an entity must show that its innovative technology was developed specifically for the advancement of a particular service, in conjunction with a particular rule making before the Commission.[38] Otherwise, an entity that had developed a technology useful in a variety of different services would be eligible for a preference in each and every new service established by the Commission, a result inconsistent with the clear intent and language of our rules.

35. We reaffirm that Qualcomm has not made a showing of significant development of innovative broadband PCS technology. Further, it has not raised on reconsideration any new issue that was not fully addressed in the *Third R&O*. In that decision, we concluded that technical developments associated with Qualcomm's proposal -- including the coding and signal processing subsystems that incor-

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[32] *See Second R&O, supra* note 22, at para. 57.

[33] We further note that Nextel did not support the adoption of 10 MHz channels, but rather supported 15 MHz and 30 MHz channels; *id.*, at para. 48.

[34] The *Third R&O* denied PCNS-NY's pioneer's preference request and PCNS-NY does not request reconsideration of this denial.

[35] *See* Cox at 1 (March 17, 1992).

[36] *See Erratum*, GEN Docket No. 90-314 (Chief Engineer, March 14, 1994). The *Erratum* was issued prior to publication of the *Third R&O* in the *FCC Record;* therefore the *Third R&O* as published in the *FCC Record* incorporated the correction made by the *Erratum*.

[37] *See* Qualcomm Request for Pioneer's Preference (Request) (May 4, 1992).

[38] *Pioneer's Preference Report and Order, supra* note 3 at para. 37.

porate its spread spectrum wave form design, power control system, handoff system, and receiver -- were developed for implementation of its 800 MHz digital cellular system and did not appear to have a nexus to any new or innovative technology directly connected to broadband PCS at 2 GHz. Qualcomm acknowledges that it has been developing its CDMA technology since 1985. It stated in its original preference request that its CDMA technology had been validated for 800 MHz digital cellular systems in field tests that began in November 1989 and that this technology was under consideration as a standard for the 800 MHz cellular bands.[39] Additionally, Qualcomm states that its CDMA system design was developed for digital cellular applications and that the system is a candidate for the second generation of cellular systems.[40] It is also clear that Qualcomm designed its CDMA equipment to use a 1.25 MHz bandwidth so that it could be easily accommodated in the cellular bands.[41] There are no particular new developments that appear to have been designed to provide 2 GHz broadband PCS service. Accordingly, we affirm our decision in the *Third R&O* and deny Qualcomm's pioneer's preference request.

Spatial Communications Inc. (PP-73)

36. In its petition for reconsideration, SCI requests that we reconsider our denial of its pioneer's preference request for its work in developing "Spatial Division Multiple Access" (SDMA) technology. SCI bases its argument for reconsideration solely on the fact that the Commission did not consider an experimental report filed by SCI's parent company, ArrayComm, Inc. (ArrayComm), on September 13, 1993. SCI contends that this report conclusively establishes SCI's pioneering work in SDMA technology, which warrants a pioneer's preference.

37. In its pioneer's preference request, SCI states that SDMA technology uses "smart" antennas to track mobile units and selectively direct radio frequency energy toward them. SCI claims that SDMA can increase spectrum efficiency by up to a factor of ten by reducing the transmitter power needed for provision of high-quality communications and can offer position-location features that can be used for enhanced emergency (911) services. Four parties commented on SCI's preference request , but none stated that SCI's proposal warranted a preference.

38. In the *Tentative Decision*, we proposed to deny SCI's request for a preference because it had neither demonstrated that its technology was feasible nor that it had developed the capabilities or possibilities of a specific, identifiable PCS technology or service nor that it had brought the technology or service to a more advanced or effective state. SCI did not respond to the *Tentative Decision*. Accordingly, we denied its preference request in the *Third R&O*.

39. SCI now contends that ArrayComm's September 13, 1993 experimental report was a response to the *Tentative Decision* and should have been considered by the Commission in the *Third R&O* in our evaluation of SCI's pioneer's preference request. However, ArrayComm's report did not reference SCI's pioneer's preference request and was filed under a special temporary authorization that relates to cellular frequencies (824-849/869-894 MHz), not 2 GHz PCS frequencies. Further, ArrayComm did not request that its experimental report be associated with SCI's pioneer's preference request. Thus, since the report was not filed in the name of the real party in interest, was filed over a year later than the original request, and was not appropriately referenced, we had no reason to consider this report in evaluating SCI's pioneer's preference request. In any event, we have now reviewed the contents of the report and since the report does not relate to 2 GHz PCS frequencies, it is insufficient to justify a pioneer's preference award to SCI. Accordingly, we affirm our denial of SCI's pioneer's preference request and deny its petition for reconsideration.

ORDERING CLAUSE

40. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by Advanced Cordless Technologies, Inc. and Corporate Technology Partners ARE DISMISSED; and that the petitions for reconsideration filed by Advanced MobileComm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc.; Ameritech; Nextel Communications, Inc.; Personal Communications Network Services of New York, Inc; Qualcomm Incorporated; and Spatial Communications Inc. ARE DENIED IN PART and DISMISSED IN PART.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[39] *See* Request at 2.
[40] *Id.*, Appendix A at 1.
[41] *Id.* at 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Modification of *Ex Parte*
Procedures in Certain
Cable Rate Proceedings

ORDER

Adopted: September 8, 1994; Released: November 25, 1994

By the Commission:

I. BACKGROUND

1. In 1992, Congress adopted, effective October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992.[1] The Commission has established cable rate regulation rules and policies to implement the 1992 Cable Act's provisions.[2]

2. The 1992 Cable Act and the Commission's implementing rules and regulations generally provide that where effective competition is present, cable television rates are not subject to government regulation but shall be regulated by the market. Where effective competition is absent, however, cable rates are regulated to protect the interests of subscribers. This regulation is undertaken jointly by the Commission and by state and local governments ("local franchising authorities"). The appropriate local franchising authority is generally responsible for regulating rates for basic cable service (which is the lowest level of cable service available), equipment used to receive basic cable service, and installation and service charges related to basic service. The Commission regulates cable programming service, which includes all program channels that are not included in basic service and are not separately offered as pay-per-channel programming or pay-per-program services.[3] The Commission also has authority over appeals of local franchising authority rate orders.

3. The Commission's jurisdiction over a cable operator's cable programming service rates in a specific franchise area attaches at such time as a valid complaint is filed with the Commission regarding the operator's cable programming service rates in that franchise area.[4] Currently, almost all cable operators of any significant size are parties to numerous rate proceedings pending before the Commission based upon complaints regarding cable programming service tier rates and appeals of local franchising authority basic tier rate orders.

4. To ensure that the Commission's decisional processes are fair and impartial, the Commission has prescribed rules and regulations governing *ex parte* communications.[5] With respect to the classification of cable rate proceedings for purposes of the *ex parte* rules, the Commission established in its May 3, 1993 *Rate Order* that cable programming complaint proceedings are classified as "restricted" proceedings upon the filing of the operator's response.[6] In its *Third Reconsideration*,[7] the Commission established that appeals of local rate decisions also are classified as "restricted" proceedings. Pursuant to the Commission's rules, *ex parte* presentations are prohibited in all of these restricted proceedings.[8]

5. Also pending before the Commission are a number of rulemakings regarding the implementation of the 1992 Cable Act.[9] The rulemaking proceedings are "nonrestricted" under the Commission's *ex parte* rules and as such are subject to the "permit but disclose" rules.[10] Presentations regarding issues within those proceedings are not prohibited nor are general discussions outside of the rulemaking context, provided they "do not deal with the merits of" pending restricted proceedings.[11]

6. Various cable television system operators have made presentations to the Commission on issues relating to the Commission's cable television rate regulations. These communications have generally been in the nature and context of broad policy discussions regarding the rules as well as the future application of the rules to the operators, but frequently also have focused on the specific economic situation and future prospects of a particular company. We believe that such presentations are valuable and are likely to continue.

7. To the extent that such discussions take place within the context of the ongoing rulemaking proceedings, they are permitted under the *ex parte* rules as long as the parties comply with the disclosure requirements applicable to any rulemaking proceeding that may be involved. If the discussions do not relate to issues in a rulemaking or any other pending restricted or nonrestricted proceeding, then the communications would be permissible and no disclosure requirements would apply. However, it is possible that presentations, to the extent they raise issues that might be construed to be involved in pending cable rate cases, could be viewed as relating to the merits or outcome of those

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[1] Pub. L. No. 102-385, §§ 3, 9, 14, 106 Stat. 1460 (1992).

[2] *See generally* orders in Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Dockets 92-266 and 93-215.

[3] Rates for pay-per-program services and pay-per-channel programming are unregulated.

[4] *See* 47 C.F.R. §§ 76.950 - 76.957.

[5] These rules are contained in 47 C.F.R. §§ 1.1200 *et seq.*

[6] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993) (*Rate Order*), at 5857, ¶ 361.

[7] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, and Buy-Through Prohibition, MM Docket 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316 (1994) (*Third Reconsideration*), at 4342 n.38.

[8] 47 C.F.R. § 1.1208.

[9] *E.g.* MM Docket 92-266, MM Docket 93-215, and CS Docket 94-28.

[10] 47 C.F.R. § 1.1206. The "permit but disclose" *ex parte* rules applicable to nonrestricted proceedings permit *ex parte* presentations to Commission decision makers, but require that these presentations be disclosed in the record of the relevant proceedings.

[11] *See* 47 C.F.R. § 1.1206.

ongoing cases. Because the rate complaint and appeal proceedings are restricted, the discussions may be construed to create *ex parte* concerns.[12]

8. The purpose of this Order is to clarify any ambiguity that has arisen or might arise as a result of such discussions between parties and Commission staff. This Order also establishes procedures to be followed in order to avoid such ambiguity in the future.

II. DISCUSSION

9. Discussions among system operators, local franchising authorities, and the Commission are of great value to the Commission in its development and implementation of rules to effectuate the purposes of the 1992 Cable Act, and it is in the public interest that they be allowed to continue. The public interest also requires, however, that the rights of parties to the restricted rate proceedings be protected. The Commission's interest in achieving its rulemaking and ratemaking goals must be balanced with the parties' interest in ensuring that decisions in the operators' complaint and appeal proceedings are based upon a record available to all interested parties.

10. In order to achieve these goals, and pursuant to Section 1.1200(a) of the Commission's rules,[13] the Commission hereby determines that, upon request and a proper showing by a cable operator or other interested party, the Commission may apply relaxed *ex parte* rules to pending cable rate proceedings regarding the requesting party, to allow discussions, such as referenced above, that are general in nature although they potentially implicate specific pending rate proceedings. Discussions that are specific to individual pending rate proceedings, rather than general to the operator as a whole, will continue to be subject to the rules applicable to restricted proceedings. Discussions that implicate pending rulemaking proceedings will continue to be subject to the rules applicable to nonrestricted proceedings.[14]

11. Any party wishing to take advantage of the modified *ex parte* procedures in cable rate proceedings and to meet with the Commission regarding general issues, such as company-wide application of the cable rules, that impact specific rate proceedings must: (i) submit to the Cable Services Bureau a written request to meet, which must include, if applicable, a request for relaxed *ex parte* treatment of any relevant restricted proceedings and an explanation of why such treatment is in the public interest;[15] (ii) receive Bureau approval to meet, and if applicable, Bureau approval of the relaxed treatment for the relevant restricted proceedings; and (iii) in the event a specific company-wide proposal or proposed resolution is ultimately developed, serve all parties to each affected pending rate complaint and/or appeal proceeding with the final version of the proposal or proposed resolution. The Commission will take no action based on any such proposal or proposed resolution without it having first been served on all parties to each affected pending rate complaint and appeal proceeding and without providing not less than thirty days for comment thereon.

III. ORDERING CLAUSE

12. IT IS ORDERED, pursuant to 47 C.F.R. § 1.1200(a), that modified *ex parte* procedures are available in the cable television rate regulation area, and may be invoked as noted above.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[12] This is true irrespective of the existence of a nonrestricted proceeding because any presentation to the Commission -- even one made wholly independent of a proceeding -- potentially could trigger *ex parte* concerns if it were directed to the merits or outcome of a restricted proceeding. *See* 47 C.F.R. § 1.1202(a).

[13] Section 1.1200(a) permits the Commission to adopt modified *ex parte* procedures in particular proceedings if the public interest so requires.

[14] *See* Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings, Docket 86-225, Report and Order, 2 FCC Rcd 3011 (1987) and in particular ¶ 21 at 3014.

[15] Requests should be addressed to the Secretary of the Commission with copies to the attention of the Chief, Cable Services Bureau.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: December 13, 1994

Ms. Loretta Smith 1800C3-M
120 Sixteenth Street, S.E. 94080115
Washington, D.C. 20003

Dear Ms. Smith:

This is in response to your request for reconsideration of our decision, released July 27, 1994, regarding your personal attack complaint against WOL(AM), Washington, D.C. Your claim was that, during the discussion of alleged government conspiracies involving public figures, Cathy Hughes, of WOL(AM), characterized you as a stalker involved in a government conspiracy against her. In our decision, we found that your complaint did not present evidence sufficient to establish that WOL's broadcast constituted a personal attack, as defined by Section 73.1920 of the Commission's rules (47 C.F.R. Section 73.1920). Specifically, we held that you had apparently failed to contact the station to give it an opportunity to explain. We concluded that your complaint also failed because it did not establish that the conspiracy theories surrounding the shootings of several public figures, primarily Dr. Martin Luther King, Jr., constituted controversial issues of public importance in the Washington, D.C. area.

In your reconsideration request, you state that you did contact the station before filing a complaint, but received no explanation. You also assert that the theories surrounding Dr. King's death are controversial issues of public importance as evidenced by the public's interest in them. You argue that the interest has been maintained by: James Earl Ray's many escapes from prison; his being on the cover of TIME Magazine; and, his appearances on talk shows during which people call in to express their opinions as to whether he acted alone or was part of a conspiracy. You assert that public opinion is divided on the issue. You also note that, as recently as May 25, 1994, the Tennessee Board of Paroles held a hearing regarding Ray, and that this engendered the expression of opposing opinions on the issue of the conspiracy theory. You claim that due to public interest in the issue, this hearing has been aired on Court TV many times, as recently as July 30, 1994.

You further assert that about the time of the broadcast, the *Commercial Appeal* newspaper (Memphis, TN) ran a story about an alleged conspiracy to kill Dr. King and that WOL obtained copies of the *Commercial Appeal* and sold them, apparently prompting the program on which the alleged personal attack occurred. You then assert that the heated debates in Washington D.C. will continue because Mark Lane, who has served as a attorney to James Earl Ray, resides in the area.

DISCUSSION

Under the personal attack rule, a licensee must contact an individual or group whose honesty, character, integrity, or like personal qualities have been attacked during the discussion of a controversial issue of public importance, provide certain specified information about the attack, and allow the individual or group a reasonable opportunity to respond. The Commission neither investigates nor interferes in any way with a licensee's judgment in this sensitive First Amendment area, absent a showing that the licensee has been clearly unreasonable in failing to contact a particular group or individual and allow a response. To initiate an investigation of whether a licensee violated the personal attack rule, therefore, a complainant must pass the threshold test; *i.e.*, make a showing that the alleged attack took place during the discussion of a controversial issue of public importance. Such evidence would include information regarding the degree of attention paid to an issue by government officials, community leaders, and the media, and whether the issue is the subject of vigorous debate with substantial elements of the community in opposition to one another. *See Fairness Doctrine and Public Interest Standards*, 48 FCC 2d 1 (1974), *recon. denied*, 58 FCC 2d 691 (1976).

The Commission's role in reviewing personal attack complaints is not to substitute its judgment for that of the licensee or network but rather to determine whether the station has acted reasonably and in good faith in ascertaining whether a personal attack has occurred. In the absence of a clear and convincing showing that the licensee has been unreasonable or that there has been an abuse of journalistic discretion, Commission action is not justified. *See Lynne Gordon*, 67 FCC 2d 27 (B/c Bur. 1977).

You have not furnished information sufficient to persuade us that the licensee should have notified you and allowed you to respond. Even taking the evidence in a light most favorable to you, *i.e.*, accepting that the alleged attack on you was an integral part of a discussion of the conspiracy theories surrounding public figures, we do not find that the attack occurred during the discussion of a controversial issue of public importance. The evidence presented does not pass the threshold test, which requires a showing -- sufficient to support Commission reversal of the licensee's journalistic discretion -- that the conspiracy theories surrounding Dr. Martin Luther King, Jr., and others are controversial issues of public importance in the Washington, D.C., area. Rather, the evidence submitted reflects only media attention to various events that are newsworthy or of historical import. *See Healy v. FCC*, 460 F.2d 917, 922 (1972); *see also Letter to John W. Dean*, 93010264 (MMB, released June 16, 1993). Moreover, although you assert that some people disagree as to the theories, you have presented no evidence that, at the time of the broadcast, the conspiracy theories were the subject of vigorous debate in the Washington, D.C. area, and that substantial elements of this community were in opposition to one another. Neither one station's distribution of a newspaper leading to the presentation of panel discussion/call-in shows nor the residence in the area of an attorney who has represented James Earl Ray is sufficient to support your claim. Your other examples do not involve Washington, D.C. specifically and appear to reflect the public's interest in an important historical event.

In view of the absence of clear and convincing evidence that the licensee of WOL(AM) has been unreasonable in this matter, it appears that no Commission action is warranted on your complaint. As a result, your request for reconsideration IS DENIED.

Staff action is taken here under delegated authority. Application for review by the Commission may be requested within 30 days of the date of public notice of this ruling (see Commission Rule 1.4(b) (47 C.F.R. Section 1.4(b)) by filing with the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to parties to the Complaint. See Commission Rule 1.115 (47 C.F.R. Section 1.115).

Sincerely,

Milton O. Gross
Chief, Political
Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-144

In the Matter of

Amendment of Section 73.202(b), RM-8554
Table of Allotments,
FM Broadcast Stations.
(Dickeyville, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 5, 1994; Released: December 13, 1994

Comment Date: February 3, 1995
Reply Comment Date: February 21, 1995

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by James F. Munson ("petitioner"), seeking the allotment of Channel 266A to Dickeyville, Wisconsin, as that community's first local service. Petitioner submitted information in support of the proposal and expressed his intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration. Channel 266A can be allotted to Dickeyville, Wisconsin, in compliance with the Commission's spacing requirements without a site restriction.[1]

3. In view of the fact that the proposed allotment would provide a first local service to Dickeyville, Wisconsin, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
Community	Present	Proposed
Dickeyville, Wisconsin	---	266A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 3, 1995**, and reply comments on or before **February 21, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

James F. Munson
P.O. Box 385
Dickeyville, Wisconsin 53808

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

[1] The coordinates for Channel 266A at Dickeyville are 42-37-38 and 90-35-31.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-52

In the Matter of

Amendment of Section 73.606(b), RM-8473
Table of Allotments,
TV Broadcast Stations
(Waimanalo, Hawaii)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 6, 1994; Released: December 13, 1994

By the Acting Chief, Allocations Branch:

1. Pursuant to the request of Joyce Cathcart ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 2762 (1994), proposing the allotment of UHF Television Channel 56 to Waimanalo, Hawaii, (population 3,508) as that community's first local television service. Petitioner filed comments in support of the proposal restating her intention to apply for the channel, if allotted. The *Notice* requested petitioner to include an affidavit verifying that the statements contained in her petition were accurate, as required by Section 1.52 of the Commission's Rules. Petitioner failed to correct this deficiency. However, HTV/HTN/Hawaiian Television Network, Inc. ("HTVN"), filed reply comments (with counsel) stating an intention to apply for Channel 56, if allotted to Waimanalo. HTVN also filed reply comments expressing an interest in MM Docket No. 94-30 at Kaneohe, Hawaii, and MM Docket No. 94-53 at Kailua, Hawaii. HTVN recognizes it cannot be the licensee of more than one full power TV station if the Grade B contours of the stations overlap. In addition, due to the close proximity of the communities involved in the three proposals, HTVN can only apply for one station. In MM Docket No. 94-30, we are allotting TV Channel 66+ to Kaneohe, Hawaii, adopted November 22, 1994. Therefore, the proposal to allot Channel 56 to Waimanalo, Hawaii, IS DISMISSED. *See* §1.401(b) and *Amendment of §1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919 n.41 (1990).

2. IT IS FURTHER ORDERED, That the petition for rule making filed by Joyce Cathcart requesting the allotment of UHF Television Channel 56 to Waimanalo, Hawaii (RM-8473) IS DISMISSED.

3. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

4. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-53

In the Matter of

Amendment of Section 73.606(b), RM-8475
Table of Allotments,
TV Broadcast Stations
(Kailua, Hawaii)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 6, 1994; Released: December 13, 1994

By the Acting Chief, Allocations Branch:

1. Pursuant to the request of Paul Alfred Tennyson ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 2758 (1994), proposing the allotment of UHF Television Channel 50 to Kailua, Hawaii, (population 36,818) as that community's first local television service. Petitioner filed comments in support of the proposal restating its intention to apply for the channel, if allotted. The *Notice* requested petitioner to include an affidavit verifying that the statements contained in his petition were accurate, as required by Section 1.52 of the Commission's Rules. Petitioner failed to correct this deficiency. However, HTV/HTN/Hawaiian Television Network, Inc. ("HTVN") filed reply comments (with counsel) stating its intention to apply for Channel 50, if allotted to Kailua. HTVN also filed reply comments expressing an interest in MM Docket No. 94-30 at Kaneohe, Hawaii, and MM Docket No. 94-52 at Waimanalo, Hawaii. HTVN recognizes that it cannot be the licensee of more than one full power TV station if the Grade B contours of the stations overlap. In addition, due to the close proximity of the communities involved in the three proposals, HTVN can only apply for one station. In MM Docket No. 94-30, we are allotting TV Channel 66+ to Kaneohe, Hawaii , adopted November 22, 1994. Therefore, the proposal to allot Channel 50 to Kailua, Hawaii, IS DISMISSED. *See* §1.401(b) and *Amendment of §1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919 n.41 (1990).

2. IT IS FURTHER ORDERED, That the petition for rule making filed by Paul Alfred Tennyson requesting the allotment of UHF Television Channel 50 to Kailua, Hawaii (RM-8475) IS DISMISSED.

3. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

4. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-55

In the Matter of

Amendment of Section 73.202(b), RM-8454
Table of Allotments,
FM Broadcast Stations.
(Vail, Colorado)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 6, 1994; Released: December 13, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 9 FCC Rcd 3123 (1994), issued in response to a request filed by Ryan B. Smith and Jennifer Tufty ("petitioners") proposing the allotment of Channel 237A to Vail, Colorado, as that community's second local FM service. Petitioners failed to file comments in response to the *Notice*. Opposing comments were filed on behalf of Mountain High Communications, Inc. ("MHC"). Gardiner Broadcast Partners, Ltd. ("GBP") filed informal comments in opposition to the rule making proposal.[1]

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. In the absence of such an expression of interest, it is the Commission's policy to refrain from allotting a channel. As a result of the petitioners' failure to respond to the *Notice*, the request to allot Channel 237A to Vail, Colorado, will be dismissed. *See Gilman, Illinois*, 6 FCC Rcd 2197 (1991), and the Appendix to the *Notice*.

3. In view of the above, IT IS ORDERED, That the request of Ryan B. Smith and Jennifer Tufty (RM-8454), proposing the allotment of FM Channel 237A to Vail, Colorado, IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning the above, contact Nancy V. Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In view of the petitioners' failure to respond to the *Notice*, MHC's opposing comments are moot and need not be considered in this proceeding. Moreover, as GBP's comments were not filed in accordance with the requirements of Section 1.420(e) of the Commission's Rules and paragraph 5 of the Appendix to the *Notice*, they also will not be considered herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-26

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Pago Pago, American Samoa)

ORDER
(Proceeding Terminated)

Adopted: December 6, 1994; Released: December 13, 1994

By the Acting Chief, Allocations Branch:

1. The Commission, on its own motion, hereby rescinds the *Report and Order*[1] in this proceeding which deleted Channel 266C1 from Pago Pago, American Samoa. The rule making was initiated to accommodate the use of the channel by a new FM station licensed by the independent nation of Western Samoa. While we believed that Channel 266C1 was allotted to Pago Pago, the channel is actually allotted to Leone, American Samoa, but had been applied for use at Pago Pago, under the now defunct 15-mile rule.[2]

2. Accordingly, pursuant to the authority contained in Section 1.113, IT IS ORDERED, That the *Report and Order* in this proceeding IS HEREBY RESCINDED.

3. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

4. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] *See* 59 FR 59200, November 16, 1994.
[2] *See The Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, 53 RR 2d 681 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 14, 1994

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PETITIONS OF IDCMA AND AT&T FOR DECLARATORY RULING REGARDING FRAME RELAY SERVICES

On November 28, 1994, Independent Data Communications Manufacturers Association, Inc. (IDCMA) filed a petition with the Commission seeking a declaratory ruling as to whether AT&T's InterSpan Frame Relay Service is a basic transmission service subject to regulation under Title II of the Communications Act and should be offered under tariff.

IDCMA describes the Inter-Span Frame Relay Service as a high speed, packet-based data service. IDCMA seeks the ruling because AT&T treats the service as an enhanced service and currently offers it on an unregulated, negotiated contract basis. IDCMA argues that frame relay service contains none of the elements necessary to make it an enhanced service. IDCMA argues that AT&T's offering of frame relay transport service on a non-regulated, non-tariffed basis has an adverse effect on telecommunications users. IDCMA seeks to have AT&T's frame relay service offered under tariff, subject to the Commission's unbundling requirements.

On December 5, 1994, AT&T filed a petition for declaratory ruling requesting that if the Commission issues a declaratory ruling in response to IDCMA's petition, that ruling should apply equally to the frame relay services offered by all interexchange carriers.

Interested parties may file comments on these petitions for a declaratory ruling **January 23, 1995**, and reply comments by **February 13, 1995**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of these petitions for a declaratory ruling can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally,* 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 1, 1994

GTE REQUESTS APPROVAL OF REVISED ZONE DENSITY PRICING PLAN

Pleading Cycle Established

Comments: December 15, 1994
Reply Comments: December 22, 1994

On October 20, 1994, GTE Service Corporation, on behalf of the GTE Telephone Operating Companies and the GTE System Telephone Companies (collectively, GTE), requested that the Commission approve revisions to GTE's zone density pricing plan.[1] GTE proposes to change the method of assigning central offices to pricing zones under its zone density pricing plan. GTE's revised plan would assign central offices to pricing zones based upon the specific characteristics of each GTE study area. Also, GTE proposes to revise its zone density pricing plan to add a zone density pricing plan for GTE Hawaii Telephone Company for the state of Hawaii.[2] Interested parties may file comments on GTE's request no later than December 15, 1994. Replies must be filed by December 22, 1994.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 CFR § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington D.C. 20554.

For further information, contact Debra Sabourin, Tariff Division, Common Carrier Bureau, (202) 418-1530.

FEDERAL COMMUNICATIONS COMMISSION

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[1] *See Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992) (the Commission permitted Tier 1 local exchange carriers, except those companies that remain in the National Exchange Carrier Association pool, to introduce density zone pricing of interstate high-capacity special access in a study area after their expanded interconnection offerings are operational in that study area), *aff'd*, 9 FCC Rcd 5154 (1994).

[2] *See also* Amendment to GTE Request for Approval of Revised Zone Density Pricing Plan (filed Nov. 1, 1994) (GTE submitted a list of the relevant Kentucky central offices that GTE says were inadvertently omitted from GTE's request for approval); *see also* Amendment to GTE Request for Approval of Revised Zone Density Pricing Plan) (filed Nov. 23, 1994) (GTE submitted a list of the central offices that GTE "has moved from a Zone 2 classification to Zone 1 due to contiguity to a Zone 1 office . . . [and] maps which show these offices.").

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-123

In re

Review of the Prime Time
Access Rule, Section 73.658(k) of the
Commission's Rules

ORDER GRANTING EXTENSION OF TIME FOR FILING COMMENTS AND REPLY COMMENTS

Adopted: December 7, 1994; Released: December 8, 1994

By the Chief, Mass Media Bureau:

1. On October 25, 1994, the Commission released a *Notice of Proposed Rule Making ("Notice")*, FCC 94-266, in this proceeding, soliciting comment on the legal and policy justifications, in light of current economic and technological conditions, for the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, and to consider the continued need for the rule in its current form. The deadline for filing comments is currently January 6, 1995, and the deadline for filing reply comments is currently February 6, 1995.

2. On November 29, 1994, a joint motion for extension of time for filing comments and reply comments was filed by the Association of Independent Television Stations, Inc., Viacom, Inc. and King World Productions, Inc. ("Joint Petitioners"). The motion requests that the deadline for filing comments be extended by sixty days, and the reply comment deadline to follow thirty days thereafter. Under this schedule, comments would be due on March 7, 1995, and reply comments due by April 6, 1995. On December 1, 1994, joint comments in support of the extension of time request were filed by CapCities/ABC, Inc., CBS Inc. and National Broadcasting Company, Inc. ("Joint Commenters").

3. The Joint Petitioners contend that in order to respond to the comprehensive economic analysis called for in the *Notice*, they have retained a leading economic consulting group which, in an attached letter, states that the additional time is necessary not only to collect and tabulate the economic data (which generally does not now exist in computerized formats), but also to analyze that data using economic and statistical models. Similarly, the Joint Commenters report that each of the economists with whom they consulted advised them that it would be impossible to prepare an appropriately responsive economic study within the time frame established by the *Notice* because of the breadth and depth of the issues raised. These parties maintain that the grant of this request will serve the public interest by permitting them sufficient time to compile the information necessary for generating the comprehensive record that the Commission seeks in this proceeding.

4. As set forth in Section 1.46 of the Commission's Rules, 47 C.F.R. Section 1.46, it is our policy that extensions of time for filing comments in rulemaking proceedings shall not be routinely granted. However, under the circumstances described above, we believe that the requested extension of time to file comments and reply comments is warranted in light of the number and complexity of the issues raised in this proceeding. This extension of time should facilitate the development of a full and complete record on the issues raised in the Notice and, thus, it appears reasonable to provide the commenting parties additional time to analyze and address these issues.

5. Accordingly, IT IS ORDERED, that the Joint Motion for Extension of Time filed by the joint petitioners IS GRANTED, the time for filing comments in this proceeding IS EXTENDED to **March 7, 1995**, and the time for filing reply comments in this proceeding IS EXTENDED to **April 6, 1995**.

6. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Section 0.204(b), 0.283, and 1.45 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BROOKRIDGE CABLE SPECIAL PURPOSE PARTNERSHIP II, PARENT COMPANY OF OF BROOKSHIRE CABLE TV, L.P.

Petition for Reconsideration

of Certification of
the City of Argyle, Texas (TX1060)
to Regulate Basic Cable Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1994; Released: December 5, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 22, 1993, Brookridge Cable Special Purpose Partnership II, parent company of Brookshire Cable TV, L.P., ("Brookridge") filed a timely petition for reconsideration challenging the certification of the City of Argyle, Texas ("Argyle") to regulate rates for basic cable service and associated equipment.[1] Argyle did not file an opposition to Brookridge's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[3] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[6]

II. DISCUSSION

3. In its petition, Brookridge states that its system serving the City of Argyle, Texas, its franchise area, is subject to effective competition because the system serves fewer than 30 percent of the homes within its franchise area.[7] Specifically, Brookridge claims that it serves 170 subscribers in a city with 594 "homes" or only 29 per cent of the "homes" in the franchise area. As support, Brookridge submits a declaration under penalty of perjury from its president who states that the system serves 170 subscribers in a city with 594 "homes" according to the Census Bureau.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[8] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, exists in the franchise area.[9] We find that Brookridge had failed to meet this burden. Brookridge did not support its effective competition claim with adequate documentation. Brookridge's declaration under penalty of perjury in this case was purely conclusory. Although Brookridge's declaration makes reference to the 1990 Census, it does not explain the specific housing data relied upon to support Brookridge's effective competition claim. Thus, it is unclear whether Brookridge relied upon "household" data as required by our rules.[10] As Brookridge has failed to support its effective competition claim with sufficient evidence, we will deny its petition.

III. ORDERING CLAUSES

5. According, IT IS ORDERED that the petition for reconsideration filed by Brookshire Cable Special Purpose Partnership II, parent company of Brookshire Cable TV, L.P., challenging the certification of the City of Argyle, Texas, to regulate its basic cable service rates IS DENIED.

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[1] Argyle filed its Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on October 13, 1993. Its certification became effective on November 12, 1993.

[2] 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the systems franchise area subscribe to the cable service of the system. 47 C.F.R. § 76.905(a) and (b)(1).

[8] 47 C.F.R. § 76.906.

[9] 47 C.F.R. § 76.911(b)(1).

[10] *Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994). As the Commission noted recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." The term "household" is defined by Census Bureau to include only occupied housing units. *See* Bureau of the Census, Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

6. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

7. IT IS FURTHER ORDERED that Brookshire Cable Special Purpose Partnership II, parent company of Brookshire Cable TV, L.P., SHALL FILE the required rate justifications on the appropriate forms with the City of Argyle within 30 days from the release date of this *Memorandum Opinion and Order* or 30 days from the date of receipt of notice from the City of Argyle that it is regulating rates, whichever is later.

8. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

In the Matter of

Amendment of Part 36 of The
Commission's Rules And
Establishment of a Joint Board

ORDER

Adopted: December 2, 1994; Released: December 2, 1994

By the Chief, Accounting and Audits Division:

1. This action extends by ten calendar days the deadline for filing reply comments in response to the *Notice of Inquiry (NOI)* in this proceeding,[1] in which the Commission invited comment on issues relating to the provision of interstate assistance to support the availability of reasonably priced telephone service in high-cost areas of the country. The deadline for reply comments specified in the *NOI* was December 2, 1994. Reply comments are now due on December 12, 1994.

2. On November 21, 1994, the Alaska Telephone Association (ATA) requested a 60-day extension of the reply comment deadline. Noting that the *NOI* elicited nearly 150 comments by the October 28 filing deadline, ATA stated that it needed more time to review the comments and prepare its reply. In addition to the large number of comments, ATA argued that the diversity of issues and viewpoints involved, and the detail and complexity of some of the comments, require an extension of time.

3. We do not routinely grant extensions of time.[2] In this case, the extension of time requested would jeopardize timely conclusion of the proceeding. The interim measures we adopted to moderate Universal Service Fund growth expire at the end of 1995,[3] and the deadlines set forth in the *NOI* were carefully chosen to preserve the Commission's ability to adopt new rules before the expiration of the interim rules. A substantial extension of time would pose a severe obstacle to adoption of new rules before the end of 1995. Moreover, we believe that 30 days is a reasonable length of time to address the issues raised in the initial comments. Nonetheless, we recognize that logistical difficulties in compiling a full set of comments may have caused a brief delay for some parties, particularly parties located outside the Washington, D.C. area. To address those potential logistical problems, we shall grant an extension for filing reply comments until December 12, 1994. This extension of time shall apply to all parties.

4. Accordingly, pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, as amended,[4] and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules,[5] IT IS HEREBY ORDERED, that the request of the Alaska Telephone Association for a sixty day extension of time for filing reply comments IS DENIED. IT IS FURTHER ORDERED that an extension of time until December 12, 1994, for filing reply comments IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

[1] Amendment of Part 36 of The Commission's Rules And Establishment of a Joint Board, *Notice of Inquiry*, FCC 94-199 (released August 30, 1994).
[2] 47 C.F.R. §1.46(a)
[3] Amendment of Part 36 of the Commission's Rules And Establishment of a Joint Board, *Report and Order*, 9 FCC Rcd 303 (1993).
[4] 47 U.S.C. §§ 154(j) and 155(c).
[5] 47 C.F.R. §§ 0.91 and 0.921.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BROOKRIDGE CABLE SPECIAL PURPOSE PARTNERSHIP II, PARENT COMPANY OF BROOKSHIRE CABLE TV, L.P.

Petition for Reconsideration

of the Certification of
Lackawannock Township, Pennsylvania,
to Regulate Basic Cable Service Rates
(PA2870)

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1994; Released: December 5, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 6, 1993, Brookridge Cable Special Purpose Partnership II, parent company of Brookshire Cable TV, L.P., ("Brookridge") filed a timely petition for reconsideration challenging the certification of Lackawannock Township, Pennsylvania, ("Lackawannock") to regulate rates for basic cable service and associated equipment. Lackawannock did not file an opposition to Brookridge's petition.[1]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[3] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[6]

II. DISCUSSION

3. In its petition, Brookridge states that its system serving Lackawannock Township, Pennsylvania, its franchise area, is subject to effective competition because the system serves fewer than 30 per cent of the homes within its franchise area.[7] Specifically, Brookridge states that it serves 507 subscribers in an area with 2,677 "homes" or only 19 percent of the total number of homes. As support, Brookridge submits only a declaration under penalty of perjury which states that it serves 507 subscribers in a township with 2,677 "homes" according to the 1990 Census.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[8] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, exists in the franchise area.[9] We find that Brookridge has failed to meet this burden. Brookridge did not support its effective competition claim with adequate documentation. Brookridge's declaration under penalty of perjury in this case was purely conclusory. Although Brookridge's declaration makes reference to the 1990 Census, it does not explain the specific housing data relied upon to support Brookridge's effective competition claim. Thus, it is unclear whether Brookridge relied upon "household" data as required by our rules.[10] As Brookridge has failed to support its effective competition claim with sufficient evidence, we will deny its petition.

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[1] Lackawannock filed its Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on November 9, 1993. Its certification became effective on December 9, 1993.

[2] 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system. 47 C.F.R. § 76.905(a) and (b)(1).

[8] 47 C.F.R. § 76.906.

[9] 47 C.F.R. § 76.911(b)(1).

[10] *Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994). As the Commission noted recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." The term "household" is defined by Census Bureau to include only occupied housing units. *See* Bureau of the Census, Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

III. ORDERING CLAUSES

5. According, IT IS ORDERED that the petition for reconsideration filed by Brookshire Cable Special Purpose Partnership II, parent company of Brookshire Cable TV, L.P., challenging the certification of Lackawannock Township, Pennsylvania, to regulate its basic cable service rates IS DENIED.

6. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

7. IT IS FURTHER ORDERED that Brookshire Cable Special Purpose Partnership II, parent company of Brookshire Cable TV, L.P., SHALL FILE the required rate justifications on the appropriate forms with Lackawannock Township within 30 days from the release date of this *Memorandum Opinion and Order* or 30 days from the date of receipt of notice from Lackawannock Township, Pennsylvania, that it is regulating rates, whichever is later.

8. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS
OF MICHIGAN, INC.

Petition for Reconsideration

of the Certification of
Aetna Township, Michigan
to Regulate Basic Cable Service Rates
(MI1619)

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1994; Released: December 2, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 22, 1993, C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed a timely petition for reconsideration challenging the certification of Aetna Township, Michigan to regulate rates for basic cable service and associated equipment.[1] In addition, on August 19, 1994, C-TEC submitted a supplement to its petition pursuant to a recent Commission order.[2] Aetna Township, Michigan did not file an opposition to C-TEC's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

3. C-TEC argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in Aetna Township, Michigan, its franchise area.[8] C-TEC claims that it serves 84 of the 434 households (that is, occupied housing unit)[9] in Aetna Township, Michigan, or 19 percent of the total number of households. As supporting documentation, C-TEC provides a copy of 1990 Census data[10] which shows that there are 434 households in Aetna Township, Michigan.[11] C-TEC also submits a computer print-out with sufficient subscriber information to support its claim that it serves 84 subscribers in its franchise area.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[12] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[13] C-TEC has met that burden. C-TEC appropriately relied on data reflecting the number of households as required by our rules.[14] Relying on this data, C-TEC has submitted sufficient evidence demonstrating that its cable system serving Aetna Township, Michigan, its

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[1] Aetna Township, Michigan filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition" ("FCC Form 328") on September 28, 1993. The certification became effective on October 28, 1993.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. 47 C.F.R. § 76.905(a) and (b)(1).

[9] As the Commission stated recently, "we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce,1990 Census of Population, CP-1-1B, Appendix B at B-8.

[10] As the Commission has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order, supra.*

[11] To calculate this number, C-TEC deducted the number of households in Marley Village (132) from the total number of households in Aetna Township (566).

[12] 47 C.F.R. § 76.906.

[13] 47 C.F.R. § 76.911(b)(1)

[14] *Third Recon. Order, supra.*

franchise area, serves 84 subscribers of the 434 households, or 19 percent of the households, within its franchise area. Thus, we find that C-TEC's system serving Aetna Township, Michigan is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by C-TEC Cable Systems of Michigan, Inc. challenging the certification of Aetna Township, Michigan to regulate basic cable rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification of Aetna Township, Michigan to regulate the basic cable rates of C-TEC Cable Systems of Michigan, Inc. IS RESCINDED.

7. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYNEX	Transmittal Nos. 311,
Telephone Companies	314 and 350
Revisions to	
Tariff F.C.C. No. 1	

ORDER

Adopted: November 29, 1994; Released: November 29, 1994

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On June 30, 1994, the NYNEX Telephone Companies (NYNEX) filed Transmittal No. 311 to introduce in New York State a tandem switched transport (TST) discount plan for the local transport termination and local transport facility rate elements. As initially filed, NYNEX would apply percentage discounts to a customer's TST termination and facility rates according to a percentage of the previous year's TST traffic that the customer would commit to the TST plan. The percentage discount would vary depending on the amount of TST traffic to which the customer committed and the duration of the commitment.

2. In response to customer requests, NYNEX filed Transmittal No. 314 on July 20, 1994 to modify material filed in Transmittal 311. In this transmittal, NYNEX proposes, among other things, to allow the TST plan to be ordered on a LATA-wide basis as well as on a state-wide basis, and clarifies that the discount will be applied to the customer's bill on a monthly basis and only adjusted at the annual review period if the minimum usage commitment is not met.

3. By Transmittal No. 350, filed November 21, 1994, NYNEX further modified its proposed TST plan. Transmittal 350 proposes, among other things, to: (1) modify regulations pertaining to liability charges, extensions of the commitment period, increase in the usage commitment and rate regulations; (2) introduce a 24 and 48 month commitment period; and (3) allow customers to designate the number of TST minutes of use they wish to include in the plan on an annual basis per state or LATA and to file actual discount rates, rather than discount percentages, which will be applicable to the TST minutes of use they commit to the plan.[1] All these transmittals are scheduled to become effective on November 30, 1994.

4. On July 21, 1994, WilTel, Inc. (WilTel) filed a petition to suspend and investigate Transmittal No. 311. On July 25, 1994, EMI Communications Corporation (EMI) filed comments endorsing, with reservations, Transmittal No. 311.[2] On July 25 and August 5, 1994, AT&T Corp. (AT&T) filed petitions to reject or, in the alternative, to suspend and investigate Transmittal Nos. 311 and 314, respectively. NYNEX replied on August 8, 1994. On August 9, 1994, RCI Long Distance, Inc. (RCI) filed comments in support of Transmittal No. 314.

5. WilTel argues that NYNEX's proposed TST plan would unreasonably discriminate against customers of tandem-switched transport service because these customers get smaller discounts and larger termination charges than customers with term plans for direct-trunked transport. WilTel Petition at 3-4. WilTel also contends that NYNEX's plan would unreasonably discriminate by obligating tandem-switched customers to add additional facilities to their term commitments as their business grows. According to WilTel, such requirements are not included in current tariffs for direct-trunked transport. *Id.* at 4-5. RCI and EMI filed comments in support of WilTel's objection to NYNEX's requirement that customers add facilities to their term commitments to NYNEX. RCI Comments at 2; EMI Comments at 2-3.

6. AT&T maintains that the cost data that NYNEX submitted with Transmittal No. 311 fail to show that NYNEX's volume discounts are cost-based and otherwise lawful,[3] as required by the *Switched Access Expanded Interconnection Order*. AT&T Petition (Tr. 311) at 1-2. AT&T states that NYNEX has not provided net revenue cost data required as cost support for new services under the price cap rules. AT&T Petition (Tr. 314) at 2. AT&T further argues that NYNEX's proposed discounts, which are based on a commitment of a minimum percentage of usage rather than any specific volume, discriminate against large volume users in violation of the Commission's access policies and the *Switched Access Expanded Interconnection Order*. AT&T Petition (Tr. 311) at 3-5.

7. NYNEX replies that its tariff does not discriminate by offering different discount plans for tandem-switched access and for direct-trunked access because the two services are not like services. NYNEX Reply at 3. NYNEX argues that its tariff satisfies the new services test. *Id.* at 6-7. According to NYNEX, AT&T is mistaken in stating that NYNEX's tariff must meet the net revenue test because in 1992 the Commission eliminated net revenues as a test for new services. *Id.* at 5. NYNEX also states that its tariff does not discriminate against large carriers because it offers a term discount, based on a percentage of the carrier's base year committed to the plan, that any size carrier may obtain. *Id.* at 7-8. NYNEX maintains that its commitment plan, based on usage from the previous year, reasonably requires carriers who experience growth to "make a contribution to the maintenance of the tandem-switched network." *Id.* at 9-10.

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[1] On November 29, 1994, WilTel filed a petition to suspend and investigate Transmittal 350 accompanied by a "Petition for Acceptance of Late-filed Petition to Suspend and Investigate." WilTel states that due to the "intervening Thanksgiving Holiday, WilTel personnel did not complete the review of the transmittal until the date the petition was due ... ". WilTel has not demonstrated good cause for acceptance of its late-filed petition and, therefore, the Division denies it.

[2] EMI's comments were also directed to NYNEX's request for special permission to file Transmittal 314 on less than statutory notice and to amend Transmittal 311, a tariff not yet in effect. *See* Application No. 148, filed July 20, 1994.

[3] *Citing* Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd 7374, 7434-35 (1993) (*Switched Access Expanded Interconnection Order*).

8. The Tariff Division informed NYNEX that its requirement that tandem-switched customers add additional facilities to their term commitments as their business grows appears to conflict with the *Switched Access Expanded Interconnection Order*. That order does not contemplate that such provisions for growth be included in the volume and term discounts that the Commission authorized for LEC entrance facilities and interoffice facilities.[4] By Transmittal 350 NYNEX revised its tariff to remove that requirement.

9. The Tariff Division has reviewed the transmittals and all associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

10. Accordingly, IT IS ORDERED that the petition to suspend and investigate the NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 311, filed by WilTel, Inc. IS DENIED.

11. IT IS FURTHER ORDERED that the petition to reject or, in the alternative, to suspend and investigate NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 311, filed by AT&T Corp. IS DENIED.

12. IT IS FURTHER ORDERED that the petition to reject or, in the alternative, to suspend and investigate NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 314, filed by AT&T Corp. IS DENIED.

13. IT IS FURTHER ORDERED that the petition for acceptance of late-filed petition to suspend and investigate NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 350, filed by WilTel, Inc., IS DENIED.

14. IT IS FURTHER ORDERED that the petition to suspend and investigate NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 350, filed by WilTel, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

[4] *Switched Access Expanded Interconnection Order*, 8 FCC Rcd at 7433-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications
Tariff F.C.C. No. 1

Transmittal No. 487

ORDER

Adopted: November 29, 1994; Released: November 29, 1994

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. US West Communications, Inc. (US West) filed Transmittal No. 487 on May 31, 1994 to introduce its Enhanced Pricing Plan (EPP). The EPP is a volume and term discount plan that would offer customers two additional pricing options for DS1 and DS3 private line services. Customers would receive discounted rates with expanded portability options in exchange for committing to a specified number of terminating devices for a 3- or 5-year term for DS1 and DS3 services. US West proposes to offer the EPP only to customers of DS1 and DS3 service whose terminating devices, such as channel terminations and multiplexers, terminate within 124 of US West's approximately 1700 wire centers. US West Communications, Tariff F.C.C. No. 1, Transmittal No. 487, Description and Justification (D&J) at 1.1.

2. Although the discount levels for the EPP are the same as the discount levels for existing pricing plans for DS1 and DS3 service, the expanded portability options for the EPP allow a customer additional cost-saving benefits. The EPP also would apply discounts to all rate elements associated with the customer's terminating devices,[1] although US West would not require the customer to specifically commit these rate elements to the discount plan.[2] EPP customers would be allowed to vary their commitment levels of terminating devices by 5 percent before incurring termination penalties. US West would also allow EPP customers to move their DS1 and DS3 services within and between the 124 wire centers without incurring discontinuance charges. D&J at 1.1-3.

3. On June 15, 1994, Sprint Communications Company, L.P. (Sprint) filed a petition to reject or, in the alternative, to suspend and investigate Transmittal 478. US West replied to the petition on June 27, 1994. For reasons discussed below, we reject Transmittal 487 as unreasonably discriminatory in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a).

II. SUMMARY OF PLEADINGS

A. Petition

4. Sprint argues that US West has not justified limiting the availability of EPP to 124 designated wire centers. Sprint urges the Commission to investigate whether US West is attempting to "skew" competition, either between interstate interexchange carriers (IXCs) or between itself and potential access competitors. Sprint Petition at 4-5.

5. Sprint further argues that US West has not justified offering greater discounts for the same term commitment for DS3 service than it offers for DS1 service. According to Sprint, the greater reduction on DS3 service is a non-cost-based volume discount that favors AT&T over smaller and medium IXCs who tend to generate insufficient volume to justify the use of DS3 service. Sprint Petition at 2-3.

6. Sprint also contends that Transmittal 487 is a new service because the EPP augments, but does not replace, the existing versions of month-to-month, variable term pricing plans that US West currently offers. Sprint urges the Commission to reject this transmittal because US West has not included the required cost information for a new service offering. Sprint Petition at 3-4.

B. Reply

7. US West explains that it selected the 124 designated wire centers based on concentration of demand. According to US West, its plan is "in accord with the Commission's *Order* and economic principles because it adheres to the concept that demand concentration drives cost differentials for providing access service." US West Reply at 6-8 citing In the Matter of Transport Rate Structure and Pricing, CC Docket No. 91-213, 9 FCC Rcd 615 (1994) (*Transport Basket and Bands Order).* US West states that its methodology includes wire centers that represent the top two-thirds of its traffic volume as well as three wire centers in states that did not have wire centers that met that volume criteria. *Id.* at 6-8. US West also declares that there would be no anticompetitive impact from its EPP, noting that Sprint is "well represented" in the designated wire centers. *Id.* at 8-9.

8. US West states that it proposes to offer the same discount under Transmittal 487 as it currently offers on DS3 and DS1 service. According to US West, these DS1 and DS3 discounts, which it has offered for approximately three years, comply with price cap rules. US West disputes Sprint's charge that US West has not justified offering greater discounts for the same term commitment for DS3 service (10% for 3 years or 20% for 5 years) than for DS1 service (7.5% for 3 years or 15% for 5 years). According to US West, although the Commission established the initial ratio between rates for DS1 and DS3 service, it has repeatedly refused to require the LECs to maintain a specified ratio between these rates. US West Reply at 3-4 *citing Transport Basket and Bands Order,* 9 FCC Rcd at 621-22.

[1] In addition to channel terminations and multiplexers, other rate elements may include transport channel, Self-Healing Alternate Route Protection (SHARP) and SHARP Plus. D&J at 1.2.

[2] EPP requires the customer to commit to a specified number of terminating devices. The rates for optional features and functions and transport channel mileage rate elements associated with these devices are discounted within the same fixed period, but a commitment level is not required.

9. US West initially argued that its EPP is a restructure of an existing service because it does not change pricing, term requirements, or discount percentages from those offered in current month-to-month, variable term pricing plan (VTPP) and service pricing plan (SPP) offerings. Moreover, asserted US West, no new demand is forecast by the introduction of this service, only a remapping of existing demand. *Id.* at 5-6.

III. DISCUSSION

10. In its initial review of Transmittal 487, the Bureau determined that EPP is a new service under price cap regulation, rather than a restructure of US West's existing service, because the transmittal proposes an additional new option that does not replace the existing pricing plans available under US West's tariff.[3] US West subsequently provided new cost information to support the introduction of the EPP as a new service.

11. The Commission and the courts have established a three-step analysis for determining whether an offering violates Section 202(a) of the Communications Act, 47 U.S.C. § 202(a).[4] First, the Commission must determine whether the services involved are "like." If so, the Commission must determine whether the rates are discriminatory. If they are, the Commission must determine whether the discrimination is reasonable.[5] Applying this analysis to the instant transmittal, we conclude that the DS1 and DS3 service provided to EPP customers within the specified geographic limitations is identical to the DS1 and DS3 service provided to other US West customers.

12. The next issue is whether the rates that US West proposes to provide to EPP customers are discriminatory. We conclude that they are. The EPP is offered only to DS1 and DS3 customers whose terminating devices are located in the 124 specified wire centers. Customers who subscribe to the identical DS1 and DS3 service with channel terminations or multiplexers located in any other of US West's approximately 1576 wire centers are not eligible for the EPP discounted rates with expanded portability options and must pay discontinuance charges when they move their DS1 and DS3 service.

13. Because the EPP is discriminatory, US West bears the burden of justifying that discrimination is reasonable.[6] We conclude that US West has not met this burden. US West merely describes the methodology it used to limit the EPP to areas of its highest traffic concentration -- the "top two-thirds" of its traffic volume,[7] but fails to explain why it is reasonable to limit its offering to these wire centers. Therefore, under the three-step analysis, we find that Transmittal 487 is unreasonably discriminatory, in violation of Section 202(a) of the Act.

14. We also conclude that this transmittal is unreasonably discriminatory because it violates the Commission's existing policy against geographic limitations on services. The Commission generally permits carriers to impose geographic limitations on service offerings that are caused by technical restrictions. In such cases, however, the limitations must be stated in terms of these technical restrictions.[8] US West describes no limitation upon necessary facility or network capacity that requires restricting the EPP to the 124 designated wire centers. The Bureau has previously rejected an AT&T transmittal that proposed similar geographic restrictions on a service offering.[9] AT&T's transmittal would have provided a discounted routing service only to customers whose terminating devices terminated in 15 specified LATAs. AT&T's transmittal did not specify any technical requirements that required such restrictions and did not offer any other justification for limiting the availability of its offer. The Bureau concluded that AT&T's tariff violated the Commission's prohibition against geographic limitations on offerings when such limitations are unsupported by technical requirements, and, accordingly, rejected the tariff as unreasonably discriminatory, in violation of Section 202(a) of the Communications Act. We believe that Transmittal 487 similarly violates Section 202(a).

IV. ORDERING CLAUSES

15. The Bureau finds, for the above reasons, that Transmittal 487 is unreasonably discriminatory, in violation of Section 202(a) of the Act. It is therefore patently unlawful and is rejected.

16. Accordingly, IT IS ORDERED that, pursuant to Section 202(a) of the Communications Act of 1934, 47 U.S.C. § 202(a), the tariff revisions filed by US West Communications, Inc. in Tariff F.C.C. No. 1, Transmittal No. 487, ARE REJECTED.

17. IT IS FURTHER ORDERED that the petition to reject or suspend and investigate US West Communications, Inc. Tariff F.C.C. No. 1, Transmittal No. 487, filed by Sprint Communications Company, L.P., IS GRANTED.

18. IT IS FURTHER ORDERED that US West Communications Inc. SHALL FILE tariff revisions removing the rejected material and reinstating currently effective material no later than five business days from the release of this Order to be effective on one day's notice. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. US West Communications, Inc. should cite the "DA" number of the instant Order as the authority for this filing.

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[3] *See* Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, 6824-25 (1990).

[4] *See, e.g., MCI Telecommunications Corp. v. F.C.C.*, 842 F.2d 1296, 1303 (D.C. Cir. 1980).

[5] *Id. See also MCI v. FCC*, 917 F.2d 30 (D.C. Cir. 1990).

[6] *See American Broadcasting Companies v. F.C.C.*, 663 F.2d 133, 139 (D.C. Cir. 1980). *See also Dresser Industries, Inc. v. I.C.C.*, 714 F.2d 588, 599-602 (5th Cir. 1983); *Western Union Int'l, Inc.*, 568 F.2d 1012, 1019 n.15 (2d Cir. 1977), *cert. denied*, 436 U.S. 944 (1978).

[7] US West made a limited exception to this selection process by including a wire center in each of three states where traffic volume was otherwise too low to qualify under the selection criteria for the EPP wire centers. US West Reply at 8.

[8] *See* AT&T Communications Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568, 4 FCC Rcd 4932, 4938, *rev'd on other grounds, MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990) (*VTNS Investigation Order*).

[9] AT&T Communications Tariff F.C.C. No. 15, Transmittal No. 3921, 7 FCC Rcd 4636 (Com. Car. Bur. 1992).

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GLOBAL TELECOMMUNICATIONS, INC. File No. I-T-C-94-180

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between the United States and various international points via the INTELSAT, Pan American Satellite, TDRSS, Solidaridad and Anik satellite systems for the provision of international data, voice, video, audio and television services and transborder services

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 18, 1994; Released: December 15, 1994

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communications between the U.S. and various international points via the INTELSAT, Pan American Satellite (PAS), Columbia Communications Corporation's Tracking and Data Relay Satellite System,[1] Solidaridad and Anik satellite systems for the provision of international video services, it is hereby CERTIFIED that the public convenience and necessity will be served by its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-180 IS GRANTED and Global Telecommunications, Inc. (Global) is authorized to:

a. lease from Comsat and operate channels of communication between appropriately licensed earth stations in the U.S. and INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites connecting with similar circuits between the satellites and those countries listed in Comsat's tariff for the provision of INTELSAT Business Services (IBS) and international television service provided by Global's correspondents in those countries;[2]

b. lease from Comsat and operate up to 120 64-kbps voice grade channels between appropriately licensed earth stations in the U.S. and INTELSAT AOR and POR satellites connecting with similar circuits between the satellites and each country listed in Attachment A furnished by Global's correspondents in those countries for the provision of switched voice and private line services;

c. establish channels of communication between appropriately licensed earth stations in the U.S. and the PAS-1 and Columbia TDRSS satellites connecting with similar circuits between the satellites and those countries specified in Attachments B and C furnished by Global's correspondents in those countries for the provision of services interconnected with the public switched network (PSN) (twenty-four 64-kbps circuits to each location) and not interconnected with the PSN (five 64-kbps circuits to each location) subject to any restrictions set forth in this or any other Commission Order involving separate international satellite systems;

d. establish channels of communication between appropriately licensed earth stations in the U.S. and U.S. domestic satellites system for the provision of transborder services between the U.S. and the countries listed in Attachment C consistent with INTELSAT Article XIV(d) consultations for such satellites;

e. establish channels of communication between appropriately licensed earth stations in the U.S. and the Mexican Solidaridad satellite system for the provision of transborder services between the U.S. and Mexico consistent with INTELSAT Article XIV(d) consultations governing the use of the Solidaridad system; and

f. establish channels of communication between appropriately licensed earth stations in the U.S. and the Canadian Anik satellite system for the provision of transborder services between the U.S. and Canada consistent with INTELSAT Article XIV(d) consultations governing the use of the Anik system.

3. IT IS FURTHER ORDERED that our authorization of Global to provide private lines as part of the services authorized herein is limited to the provision of such private lines only between the United States and the points listed in Attachments A and B – that is, private lines which originate in the United States and terminate in the points listed in Attachments A and B or which originate in the points listed in Attachment A and B and terminate in the United States. In addition, Global may not – and its tariff must state that its customers may not – connect private lines provided over these facilities to the public switched network at either the U.S. end or the points listed in Attachments A and B or both, for the provision of

[1] Columbia leases capacity on the TDRSS satellites from the National Aeronautics and Space Administration (NASA).

[2] The authority granted herein for all satellite systems includes authority to lease and operate domestic connecting facilities and capacity in U.S. earth stations where appropriate.

international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the points listed in Attachment A and B afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *petitions for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither Global nor any persons or companies directly or indirectly controlling or controlled by Global, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Global or any persons or companies controlling or controlled by Global are parties.

5. IT IS FURTHER ORDERED the applicant shall file copies of any operating agreements, including the applicable accounting rate, it enters into with its foreign correspondents with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file the semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. § 63.15(b) for the circuits activated over the common carrier facilities authorized herein.

9. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for the use of any additional circuits it wishes to operate via the PAS and Columbia satellite systems.

10. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to the limitations specified under the separate systems policy, applicable consultations under Article XIV (d) of the INTELSAT Agreement and PAS and Columbia's determinations whether such capacity can be offered in light of these limitations.

11. This order is issued pursuant to Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

ATTACHMENT A

COUNTRIES TO BE SERVED VIA INTELSAT
(CIRCUITS ARE 64 KBPS)

COUNTRY	NUMBER[3]	COUNTRY	NUMBER	COUNTRY	NUMBER
Argentina	120	Ireland	120	Spain	120
Australia	120	Israel	120	Sweden	120
Austria	120	Italy	120	Switzerland	120
Bahamas	120	Jamaica	120	Syria	120
Barbados	120	Japan	120	Taiwan	120
Belgium	120	Jordan	120	Thailand	120
Bolivia	120	Kenya	120	Trinidad & Tobago	120
Brazil	120	Korea, Republic of	120	Uganda	120
Canada	120	Kuwait	120	United Arab Emirates	120
Czech Republic	120	Lebanon	120	United Kingdom	120
Chile	120	Liechtenstein	120	Uruguay	120
China, People's Republic	120	Luxembourg	120	Vietnam	120
Denmark	120	Malaysia	120	Venezuela	120
Dominican Republic	120	Mexico	120	Yugoslavia	120
Ecuador	120	Morocco	120	Zaire	120
Egypt	120	Netherlands	120		
El Salvador	120	Netherlands Antilles	120		
Ethiopia	120	New Zealand	120		
Finland	120	Nicaragua	120		
France	120	Norway	120		
Germany	120	Panama	120		
Ghana	120	Peru	120		
Greece	120	Philippines	120		
Guatemala	120	Poland	120		
Guinea	120	Portugal	120		
Haiti	120	Romania	120		
India	120	Saudi Arabia	120		
Indonesia	120	Senegal	120		
Iran	120	Singapore	120		
		Somalia	120		
		South Africa	120		

[3] Refers to 64-kbps voice-grade circuits.

ATTACHMENT B

COUNTRIES TO BE SERVED VIA PAS-1
(NON-INTERCONNECTED)

Up to five (5) 64-Kbps voice grade circuits between the United States and each of the following countries:

Ku-band Countries

Anguilla
Austria
Azerbaijan
Bahamas
Belgium
Bermuda
Bosnia-Herzogovenia
British Virgin Is.
Cayman Islands
Czech Republic
Denmark
France
Germany
Greece
Ireland
Italy
Luxembourg
Monaco
Montserrat
Netherlands
Portugal
Romania
Russian Fed.
Somalia
Spain
Sweden
Switzerland
Turks & Caicos Is.
United Kingdom
Yugoslavia

ATTACHMEMT B (Cont.)

C-band Countries

Anguilla
Argentina
Aruba
Bahamas
Barbados
Barbuda
Bermuda
Bolivia
Brazil
British Virgin Is.
Cayman Islands
Chile
Colombia
Costa Rica
Dominican Rep.
Ecuador
Guatemala
Haiti
Honduras
Jamaica
Mexico
Montserrat
Netherlands Antilles
Panama
Paraguay
Peru
Trinidad and Tobago
Turks & Caicos Is.
Uruguay
Venezuela

COUNTRIES TO BE SERVED VIA PAS-1 (INTERCONNECTED)

Up to twenty-four (24) 64-Kbps voice grade circuits between United States and each of the following countries:

Ku-band Countries:

Azerbaijan
Bahamas
Bosnia-Herzogovenia
Czech Republic
Portugal
Romania
Russian Fed.
Somalia
United Kingdom

C-Band Countries:

Bahamas
Costa Rica
Dominican Republic
Netherlands Antilles
Panama
Peru

ATTACHMENT B (Cont.)

COUNTRIES TO BE SERVED VIA TDRS SATELLITES
(NON-INTERCONNECTED)

Up to five (5) non-interconnected 64-Kbps voice grade circuits between United States and each of the following countries:

TDRS-41	TDRS-174
Austria	Hong Kong
Bahamas	Japan
Belgium	Mexico
Bosnia-Herzogovenia	Republic of Korea
Canada	Philippines
Demnark	
Finland	
France	
Germany	
Ireland	
Israel	
Jamaica	
Liechtenstein	
Luxembourg	
Mexico	
Netherlands	
Portugal	
Somalia	
Sweden	
Switzerland	
Turkey	
United Kingdom	

ATTACHMENT C

COUNTRIES TO BE SERVED VIA AUTHORIZED
U.S. DOMESTIC SATELLITES, MEXICAN MORELOS (AND SOLIDARIDAD)
SATELLITES AND ANIK SATELLITES

Anguilla	U.S. DomSats
Antigua and Barbuda	U.S. DomSats
Bahamas	U.S. DomSats
Barbados	U.S. DomSats
Belize	U.S. DomSats
Bermuda	U.S. DomSats
British Virgin Islands	U.S. DomSats
Canada	U.S. DomSats, Anik
Cayman Islands	U.S. DomSats
Dominica	U.S. DomSats
Grenada	U.S. DomSats
Grenadines	U.S. DomSats
Mexico	U.S. DomSats, Mexican DomSats
Montserrat	U.S. DomSats
Netherlands Antilles	U.S. DomSats
St. Kitts-Nevis	U.S. DomSats
St. Lucia	U.S. DomSats
St. Vincent	U.S. DomSats
Turks & Caicos	U.S. DomSats
Venezuela	U.S. DomSats

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone & Telegraph Company — File No. USP-94-W-142

Petition for Waiver of the International Settlements Policy for a Change in the Accounting Rate for Switched Voice Service with the United Kingdom

ORDER AND AUTHORIZATION

Adopted: December 6, 1994; Released: December 15, 1994

By the Chief, Telecommunications Division, International Bureau

I. INTRODUCTION

1. American Telephone and Telegraph Company (AT&T) has filed a petition for waiver of the Commission's International Settlements Policy (ISP)[1] to introduce and establish an accounting rate for International Switched Digital Service (ISDS) between the United States and its correspondent in the United Kingdom, Mercury Communications, Ltd. (Mercury).[2] The Commission staff sent a letter to AT&T stating that it must await formal staff action before the proposed accounting rate could be implemented.[3] In this decision, we approve the petition for waiver.

II. SUMMARY OF WAIVER REQUEST

2. In its waiver request, AT&T seeks to introduce and establish an accounting rate of 2.4 Special Drawing Rights (SDR)[4] per connect minute for ISDS[5] with Mercury, effective retroactively on March 18, 1994. This date coincides with the scheduled introduction of the service. The accounting rate would be divided equally between AT&T and Mercury. No party has opposed the ISDS accounting rate proposed by AT&T.

III. DISCUSSION

3. In its *Phase I Report and Order,* the Commission delegated authority to the Common Carrier Bureau[6] "to consider, on a case-by-case basis, granting ISP waiver requests that include a lower, more economically efficient, cost-based, international accounting rate when supported by sound analysis of the benefits that will result from the implementation of that rate."[7] The Commission stated that the Bureau should approve accounting rate changes if the changes result in a) a more cost-based accounting rate, and b) either a commitment to lower calling prices or some other public interest benefit.[8] In this context, we must decide under the ISP whether the proposed accounting rate is in the public interest.

4. The issue in the instant petition for waiver involves different transmission speeds for two service classifications within the ISDS category and the appropriate accounting rate for those classifications. At the time AT&T filed its petition for ISDS, an accounting rate of 0.6 SDR per connect minute was in effect for ISDS with Mercury. In proposing this accounting rate, AT&T stated that it would apply to service transmitted at 56/64 kilobits per second (kbps).[9] The accounting rate was approved and became effective October 1, 1993.[10]

5. AT&T's instant petition makes no reference to ISDS transmission speed. As a result, the accounting rate proposed by AT&T in the petition for waiver, 2.4 SDR per connect minute, appeared to be a significant increase in the existing accounting rate of 0.6 SDR per connect minute for ISDS between AT&T and Mercury. Following the staff's suspension of AT&T's waiver request, AT&T filed a letter of clarification in which it states that the proposed accounting rate of 2.4 SDR would be used only for ISDS transmitted at 384 kbps per second, not at 56/64 kbps.[11] The

[1] The ISP requires uniform settlement rates, accounting rates, and division of tolls for U.S. international carriers on parallel routes. *See Implementation and Scope of Uniform Settlements Policy for Parallel International Communications Routes,* 51 Fed. Reg. 4736 (1986) (*ISP Order); Reconsideration,* 2 FCC Rcd 1118 (1987); *Further Reconsideration,* 3 FCC Rcd 1614 (1988). In 1991, the Commission reformed the ISP to encourage and facilitate accounting rate reductions by U.S. carriers. *See Regulation of International Accounting Rates,* 6 FCC Rcd 3553 (1991) (*Phase I Report and Order); Reconsideration,* 7 FCC Rcd 8049 (1992).

[2] AT&T, Petition for Waiver, USP-W-94-142, March 30, 1994.

[3] See Letter from George S. Li to Elaine R. McHale, AT&T, dated April 20, 1994.

[4] A Special Drawing Right is an monetary unit composed of a market basket of currencies of five countries: the United States, Germany, the United Kingdom, France, and Japan. The value of the SDR is based on the exchange rates of these currencies. Currently, an SDR equals about $1.47, so the accounting rate, stated in U.S. dollars, is approximately $3.53.

[5] International Switched Digital Service is a dial-up, usage sensitive service for the switching and transmission of digital signals at various transmission rates that are measured in kilobits per second. The service in available on a two-point and multi-point basis.

[6] This authority has been transferred to the new International Bureau. *See Order Establishing International Bureau,* FCC 94-252, October 29, 1994.

[7] *Regulation of International Accounting Rates,* 6 FCC Rcd 3552 (1991) at 3554.

[8] *Id.*

[9] See Supplementary Data Statement to International Telecommunications Service Agreement between American Telephone and Telegraph Company and United Kingdom-Mercury Communications Ltd., December 7, 1993.

[10] The original accounting rate for this service classification, which became effective September 30, 1992, was 1.0 SDR. See AT&T, Petition for Waiver, USP-93-W-219, June 23, 1993.

[11] See Letter from Elaine R. McHale, AT&T, to George S. Li, June 22, 1994.

accounting rate for the latter ISDS classification would continue to be 0.6 SDR per connect minute. AT&T also states that the proposed accounting rate of 2.4 SDR per connect minute matches MCI's accounting rate for the ISDS-384 classification. MCI's rate became effective January 1, 1994.[12]

6. The ISDS classification that transmits data at a speed of 384 kbps requires greater communications equipment capacity than the 56/64 kbps classification. In fact, the higher speed service classification uses the equivalent of six 64 kbps per second communications lines. The greater utilization of capacity required to transmit the higher speed service suggests that there is a difference in the cost of providing the two service classifications, and this cost difference justifies a higher accounting rate for ISDS-384.

7. Based on the our analysis, we conclude that the accounting rate proposed by AT&T for ISDS transmitted at 384 kbps, 2.4 SDR per connect minute, is not an increase in the current accounting rate, 0.6 SDR per connect minute, which is used for ISDS transmitted at 56/64 kbps. The higher transmission speed for the ISDS-384 service classification uses six times the transmission capacity as the lower speed ISDS classification, and this difference justifies a difference in the accounting rate. The accounting rate of 2.4 SDR for ISDS-384, therefore, is approved.

8. Accordingly, IT IS ORDERED that AT&T's petition for waiver of the ISP, File No. USP-94-W-142, to establish and implement the accounting rate of 2.4 SDR per connect minute with Mercury for International Switched Digital Service that transmits data at 384 kilobits per second, effective March 18, 1994, IS GRANTED.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[12] See MCI, Petition for Waiver, USP-94-W-094, February 3, 1994.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

K&S INTERNATIONAL COMMUNICATIONS, INC. File No. I-T-C-94-506

Application for authority to acquire and operate facilities for provision of communications services between the United States and various overseas points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 7, 1994; Released: December 15, 1994

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED, that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED, that application File No. I-T-C-94-506 IS GRANTED, and K&S International Communications Inc. (K&S) is authorized to:

a. establish channels of communication between appropriately licensed U.S. earth stations and INTELSAT satellites, for provision of Intelsat Business Services (IBS), International Television Service and Datanet Service between the United States and the international points listed in Comsat's tariffs for the space segment of these services;

b. lease from Comsat and operate the satellite circuits specified in Appendix A, between appropriately licensed U.S. earth stations and INTELSAT Atlantic and Pacific Ocean Region satellites, connecting with similar facilities between the satellites and the overseas points listed in Appendix A, furnished by its correspondents;

c. lease from PanAmerican Satellite Corp. (PAS) and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and the PAS-1 satellite, connecting with similar circuits between the satellites and the overseas points listed in Appendix B, furnished by its correspondents;

d. lease from the Columbia/TDRSS International Satellite System (TDRSS) and operate the satellite circuits specified in Appendix C, between appropriately licensed U.S. earth stations and the TDRS-41 and TDRS-174 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix C, furnished by its correspondents;

e. establish channels of communications between appropriately licensed U.S. earth stations and U.S. domestic satellites (also Anik satellites for service to Canada, and Mexican domestic satellites for service to Mexico), for provision of authorized transborder services between the United States and the points listed in Appendix D;

f. lease and operate necessary connecting facilities in the United States;

g. lease a one-half interest in and operate any necessary overseas connecting facilities; and

h. use the facilities authorized in b, c, and d, above to provide K&S's regularly authorized services, including switched voice and data, and private line services, between the United States and the points specified in Appendices A, B, and C.

3. IT IS FURTHER ORDERED that neither K&S nor any persons or companies directly or indirectly controlling or controlled by K&S, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which K&S or any persons or companies controlling or controlled by K&S are parties.

4. IT IS FURTHER ORDERED that our authorization of K&S to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendices -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendices or which originate in one of the countries listed in the Appendices and terminate in the United States. In addition, K&S may not -- and K&S's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending.*

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the PAS-1, TDRS-41 or TDRS-174 satellites.

9. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

10. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

APPENDIX A

COUNTRIES TO BE SERVED VIA INTELSAT
(60 64-kbps circuits to each point)

Afghanistan
Algeria
Angola
Argentina
Australia
Azerbaijan
Bahamas
Bangladesh
Barbados
Belgium
Benin
Bhutan
Bolivia
Brazil
Burkina Faso
Cameroon
Canada
Cape Verde
Central Afr. Rep
Chad
Chile
China, P.R.
Colombia
Congo
Costa Rica
Cote d'Ivoire
Croatia
Cyprus
Czech Rep.
Denmark
Dominican Rep.
Ecuador
Egypt
El Salvador
Ethiopia
Fiji
Finland
France
Gabon
Germany
Ghana
Greece
Guatemala
Guinea
Haiti
Honduras
Iceland
India
Indonesia
Iran, Islamic Rep
Iraq
Ireland
Israel
Jamaica
Japan
Jordan
Kenya
Korea, Rep. of
Kuwait
Lebanon
Libya
Liechtenstein
Luxembourg
Madagascar
Malawi
Malaysia
Mali
Mauritania
Mauritius
Mexico
Monaco
Morocco
Mozambique
Nepal
Netherlands
New Zealand
Nicaragua
Niger
Nigeria
Norway
Omam
Pakistan
Panama
Papua New Guinea
Paraguay
Peru
Philippines
Portugal
Qatar
Romania
Russian Fed.
Rwanda
Saudi Arabia
Senegal
Singapore
Somalia
South Africa
Spain
Sri Lanka
Swaziland
Sweden
Syria
Switzerland
Tanzania
Thailand
Togo
Trinidad & Tobago
Tunisia
Turkey
Uganda
United Arab Emirs.
United Kingdom
Uruguay
Vatican City
Venezuela
Vietnam
Yemen Arab Rep.
Yugoslavia
Zaire
Zambia
Zimbabwe

APPENDIX B
COUNTRIES TO BE SERVED VIA PAS-1

Authority is granted for TEN 64-kbps circuits between the U.S. and each of the following countries NOT INTERCONNECTED with the public switched network, except as otherwise indicated by a circuit number in parenthesis:

Ku-Band countries

Anguilla
Austria
Azerbaijan
Bahamas
Belgium
Bermuda
Bosnia-Herzogovenia
British Virgin Is.
Caymand islands
Czech Republic
Denmark
France (36)
Germany
Greece
Ireland
Italy
Luxembourg
Monaco
Montserrat
Netherlands
Portugal
Romania
Russian Federation
Somalia
Spain (36)
Sweden
Switzerland
Turks & Caicos Is.
United Kingdom
Yugoslavia

C-band Countries

Anguilla
Argentina
Aruba
Bahamas
Barbados
Bermuda
Bolivia (18)
Brazil (36)
British Virgin Is.
Cayman Islands
Chile (36)
Colombia (36)
Costa Rica
Dominican Rep.
Ecuador
Guatemala (18)
Haiti
Honduras (18)
Jamaica
Mexico (36)
Montserrat
Netherlands Antilles
Panama (18)
Paraguay
Peru (18)
Trinidad & Tobago
Turks & Caicos Is.
Uruguay
Venezuela (36)

Authority is granted for six 64-kbps circuits between the U.S. and each of the following countries, INTERCONNECTED with the public switched network, except as otherwise indicated by a circuit number in parenthesis:

Ku-band countries

Azerbaijan
Bahamas
Bosnia-Herzogovenia
Czech Republic
Portugal
Romania
Russian Fed.
Somalia
United Kingdom (24)

C-band countries

Bahamas
Costa Rica
Dominican Republic
Netherlands Antilles
Panama (12)
Peru (12)

APPENDIX C
COUNTRIES TO BE SERVED VIA TDRS SATELLITES

Authority is granted for ten 64-kbps circuits between the U.S. and each of the following countries, NOT INTERCONNECTED with the public switched network, except as otherwise indicated by a circuit number in parenthesis:

TDRS-41

Austria
Bahamas
Belgium
Bosnia-Herzogovenia
Canada
Denmark
Finland
France (36)
Germany
Ireland
Israel
Jamaica
Liechtenstein
Luxembourg
Mexico (36)
Netherlands
Porktugal
Somalia
Sweden
Switerland
Turkey
United Kingdom (36)

TDRS-174

Hong Kong
Japan
Mexico (36)
Philippines
Republic of Korea

Authority is granted for six 64-kbps circuits between the U.S. and each of the following countries, INTERCONNECTED with the public switched network, except as otherwise indicated by a circuit number in parenthesis:

TDRS-41

Bosnia-Herzogovenia
Germany
Somalia
United Kingdom (24)

TDRS-174

Hong Kong

APPENDIX D

COUNTRIES TO BE SERVED VIA AUTHORIZED U.S. DOMESTIC SATELLITES, MEXICAN MORELOS (AND SOLIDARIDAD) SATELLITES AND ANIK SATELLITES

Anguilla	U.S. DomSats
Antigua and Barbuda	U.S. DomSats
Bahamas	U.S. DomSats
Barbados	U.S. DomSats
Belize	U.S. DomSats
Bermuda	U.S. DomSats
British Virgin Islands	U.S. DomSats
Canada	U.S. DomSats, Anik
Cayman Islands	U.S. DomSats
Dominica	U.S. DomSats
Grenada	U.S. DomSats
Grenadines	U.S. DomSats
Mexico	U.S. DomSats, Mexican DomSats
Montserrat	U.S. DomSats
Netherlands Antilles	U.S. DomSats
St. Kitts-Nevis	U.S. DomSats
St. Lucia	U.S. DomSats
St. Vincent	U.S. DomSats
Turks & Caicos	U.S. DomSats
Venezuela	U.S. DomSats

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Release Date: December 16, 1994

US WEST, RANGE TELEPHONE, RT COMMUNICATIONS, TRI-COUNTY TELEPHONE, TCT WEST, AND UNION TELEPHONE FILED PETITION FOR RECONSIDERATION OF THE COMMON CARRIER BUREAU'S MEMORANDUM OPINION AND ORDER (DA 94-954) AAD 94-150

Comment Date: January 23, 1995
Reply Date: February 6, 1995

On September 30, 1994, US West Communications, Inc., Range Telephone Cooperative, Inc. (Range), RT Communications, Inc. (RTCI), Tri-County Telephone Association, Inc. (Tri-County), TCT West (TCT), and Union Telephone Company (collectively, "Petitioners") filed a petition for reconsideration of the Common Carrier Bureau's ("Bureau") Memorandum Opinion and Order (DA 94-954, released August 31, 1994), that granted, in part, Petitioners request for waiver of the definition of "Study Area" contained in Part 36 of the Commission's rules.

Petitioners request that the Bureau reconsider its decision to deny their earlier petition to establish new study areas for local telephone exchanges. Petitioners contend that the Bureau's denial was based on the erroneous conclusion that the establishment of new study areas, in this case, would result in increased Universal Service Fund ("USF") payments. Petitioners state that, contrary to the Bureau's Order, separate study areas in this case would serve the public interest by reducing USF contributions.

Interested parties may file comments on the petitioners reconsideration petition on or before **January 23, 1995**, and reply comments on or before **February 6, 1995**, with the Secretary, Federal Communications Commission, Room 222, 1919 M Street, N.W., Washington, D.C., 20554. Comments and reply comments should reference AAD 94-150. Four (4) copies should also be sent to Adrian Wright, Cost Analysis Branch, Common Carrier Bureau, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service record duplication: International Transcription Services, Inc. (ITS, Inc.), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, Room 812, 2000 L Street, N.W., Washington, D.C. Copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* , 47 C.F.R. §§ 1.1200-1.1206. For further information contact Adrian Wright at (202) 418-0830.

Before the
Federal Communications Commission
Washington, D.C. 20554

Call U.S., Inc.,
Complainant,

v.

Puerto Rico Telephone Company, File No. E-90-127

and

American Telephone Corp. File No. E-90-128
Defendants.

ORDER

Adopted: December 7, 1994; Released: December 16, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On March 16, 1990, Call U.S., Inc. ("Call U.S.") filed the above-captioned formal complaints against Puerto Rico Telephone Co. ("PRTC") and American Telephone and Telegraph Co. ("AT&T") alleging that PRTS's practices of attempting to collect erroneously billed charges from Call U.S.'s resale customers, and AT&T's acceptance of PRTC's remittances of charges erroneously billed as AT&T international calls violated Sections 201, 202, and 203 of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. §§ 201, 202, and 203. On April 30, 1990, PRTC filed its Answer denying any violations of the Act and alleging that the activities complained of were not Title II activities subject to the provisions of the Act, and its Counterclaim for damages caused by Call U.S.'s alleged use of certain dialing sequences in connection with its resale activities. On May 7, 1990 AT&T filed its Answer denying the material allegations of Call U.S.'s Complaint.

2. On October 21, 1994, Call U.S. and PRTC filed a Stipulation to Joint Dismissal, in which Call U.S., Inc. moved for dismissal of its complaints with prejudice, and Puerto Rico Telephone Co. moved for dismissal of its counterclaim with prejudice in the above captioned matters.

3. We are satisfied that dismissing the complaints and counterclaim will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the complaints and counterclaim in the above-captioned matters ARE DISMISSED WITH PREJUDICE and that the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-145

In the Matter of

Amendment of Section 73.202(b), RM-8556
Table of Allotments,
FM Broadcast Stations.
(Sageville, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 8, 1994; Released: December 16, 1994

Comment Date: February 6, 1995
Reply Comment Date: February 21, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by The Sageville Shopper ("petitioner") requesting the allotment of Channel 291A to Sageville, Iowa, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 291A to Sageville since it could provide the community with its first local FM service. Channel 291A can be allotted to Sageville in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Sageville, Iowa	–	291A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 6, 1995**, and reply comments on or before **February 21, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James F. Munson	Larry G. Fuss
P.O. Box 1602	P.O. Box 1787
Dubuque, IA 52904	Cleveland, MS 38732
(Petitioner)	(Technical Consultant)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of

[1] The coordinates for Channel 291A at Sageville are 42-35-42 North Latitude and 90-43-18 West Longitude.

the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-30

In the Matter of

Amendment of Section 73.606(b), RM-8457
Table of Allotments,
TV Broadcast Stations
(Kaneohe, Hawaii)

ERRATUM

Released: December 16, 1994

By the Chief, Allocations Branch:

On November 30, 1994, the Commission's Mass Media Bureau released a *Report and Order* (DA 94-1301) in the above captioned proceeding. Inadvertently, a window was established for filing applications. This document deletes the window period for filing applications, and corrects the effective date to January 17, 1995.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-249

In the Matter of

Amendment of Section 73.202(b), RM-8330
Table of Allotments,
FM Broadcast Stations.
(Calabash and Tabor City,
North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 8, 1994; Released: December 16, 1994

By the Chief, Allocations Branch:

1. At the request of Great American Media, Ltd. I ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 7085 (1993), proposing the substitution of Channel 285C3 for Channel 285A at Tabor City, North Carolina, the reallotment of Channel 285C3 from Tabor City to Calabash, North Carolina, and the modification of Station WYNA's license to specify Calabash as its community of license. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. As stated in the *Notice*, petitioner submits that the reallotment of Station WYNA to Calabash will enable the station to serve an additional 66,240 persons without depriving Tabor City of its sole local aural transmissions service. Tabor City, with a 1990 U.S. Census population of 2,330 persons, will continue to receive local aural service from fulltime Station WTAB(AM).[1] Further, while petitioner acknowledges that there will be a loss of service to 9,648 persons, it states that those living within the loss area will continue to receive service from seven other FM services. However, petitioner failed to provide any information on the reception services currently available within the gain area and whether the gain area would include any underserved areas. It was requested to address these issues in its comments. In response, petitioner states that the vast majority of the population within the gain area presently receives at least five fulltime services but that a small portion of southern Bladen County, North Carolina, representing 46 persons, will receive its fifth fulltime aural reception service.

DISCUSSION

3. We believe that the substitution of Channel 285C3 for Channel 285A at Tabor City, the reallotment of Channel 285C3 from Tabor City to Calabash, and the modification of Station WYNA(FM)'s license to reflect the change is in the public interest. The reallotment will not remove Tabor City's sole local transmission service as Station WTAB(AM) will remain in the community. Calabash, with a 1990 U.S. Census population of 1,210 persons, will receive its first local aural service. Our engineering analysis shows that the reallotment of Channel 285C3 to Calabash will enable Station WYNA(FM) to serve an additional 58,442 persons with an area of 3,129 square kilometers. Further, while Calabash is closer than Tabor City to the Wilmington Urbanized Area (75 kilometers (47 miles) vs. 57 kilometers (35 miles)), none of the population gain is within the Urbanized Area. We recognize that the removal of Station WYNA(FM) from Tabor City will create a reception service loss to 25,488 persons within an area of 957 square kilometers west of Tabor City.[2] While we carefully consider any proposal that would result in a loss of existing reception service, we believe the public interest is well served by this reallotment proposal since the population within the loss area will continue to receive service from 17 FM stations licensed to the communities of Conway, Myrtle Beach, North Myrtle Beach, Dillon, Loris, Georgetown, Socastee and Bucksport, SC, and Lumberton, Laurinburg, Wilmington, Fayetteville, and Whiteville, NC. As proposed, we will also modify petitioner's license for Station WYNA(FM) to specify operation on Channel 285C3 at Calabash.

TECHNICAL SUMMARY

4. Channel 285C3 can be allotted to Calabash in compliance with the Commission's minimum distance separation requirements with a site restriction of 20.1 kilometers (12.5 miles) north to accommodate petitioner's desired transmitter site.[3] Use of this site is short-spaced to the presently licensed operation of Station WNMB, Channel 288A, North Myrtle Beach, South Carolina. However, Station WNMB's license has been modified to specify Channel 290C3 and it has filed an application for license to cover its construction permit for operation on Channel 290C3.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 30, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Calabash, North Carolina	285C3
Tabor City, North Carolina	---

[1] Station WTAB(AM) is a Class B station operating with 5 kW power day and .109 kW night.

[2] We note the discrepancy between the loss and gain population figures submitted by the petitioner and those attributed by the Commission staff. In determining loss and gain populations, the Commission methodology is to prorate a county's population, outside of cities, in proportion to the percentage of the area in question. The petitioner, rather than prorating county populations, used the population figures attributed to "minor civil divisions."

[3] The coordinates for Channel 285C3 at Calabash are 34-04-05 North Latitude and 78-31-30 West Longitude.

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Great American Media, Ltd. I for Station WYNA(FM), IS MODIFIED to specify operation on Channel 285C3, in lieu of Channel 285A, and its community of license is modified from Tabor City, North Carolina, to Calabash, North Carolina, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Great American Media, Ltd. I, licensee of Station WYNA(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-146

In the Matter of

Amendment of Section 73.202(b), RM-8557
Table of Allotments,
FM Broadcast Stations.
(Houston, Alaska)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 7, 1994; Released: December 16, 1994

Comment Date: February 6, 1995
Reply Comment Date: February 21, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Evangelistic Alaska Missionaray Fellowship, Inc. ("petitioner") requesting the allotment of Channel 242A to Houston, Alaska, as that community's third local FM service. Petitioner stated its intention to apply for Channel 242A if it is allotted to Houston, and if authorized, to build a station promptly.

TECHNICAL STATEMENT

2. A staff review of the proposal reveals that Channel 242A can be allotted to Houston, Alaska, consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, without the imposition of a site restriction, at coordinates North Latitude 61-38-01 and West Longitude 149-50-28.

3. We believe the public interest would be served by proposing the allotment of Channel 242A to Houston, Alaska, since an interest has been expressed in providing a third local FM service to that community. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Houston, Alaska, as follows:

	Channel No.	
City	Present	Proposed
Houston, Alaska	221A, 232A	221A, 232A, 242A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 6, 1995**, and reply comments on or before **February 21, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Edward W. Hummers, Jr., Esq.
Frank R. Jazzo, Esq.
Fletcher, Heald & Hildreth, P.L.C.
11th Floor
1300 North 17th Street
Rosslyn, VA 22209

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of

the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-352

In re Application of

Ronald E. Patterson & Cal E. Varner d/b/a CAPITOL CITY BROADCASTING COMPANY

File No. BPH-880812MZ

For Construction Permit for a New FM Station on Channel 247C, Longview, Texas

Appearances

David Tillotson on behalf of Ronald E. Patterson & Cal E. Varner d/b/a Capitol City Broadcasting Company; and *Charles E. Dziedzic* and *Y. Paulette Laden* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: December 5, 1994; Released: December 20, 1994

By the Review Board: MARINO (Chairman) and GREENE.

Board Member GREENE:

1. Before the Review Board is the *Supplemental Initial Decision* of Administrative Law Judge Walter C. Miller, 9 FCC Rcd 2802 (1994) (*SID*), denying the application of Capitol City Broadcasting Company for a new FM station in Longview, Texas. The ALJ concluded that Capitol City lacks the requisite financial and character qualifications for a broadcast license. Capitol City has excepted; the Mass Media Bureau has replied.

2. In *Capitol City Broadcasting Co.*, 8 FCC Rcd 8478 (1993) (*Memorandum Opinion and Order* or *MO&O*), the Commission set aside the Board's grant of Capitol City's application and remanded the proceeding for further hearing on Capitol City's financial and character qualifications. It did so because Capitol City had relied for funding on a loan commitment letter in the amount of $275,000 from Malvin Patterson, the father of fifty percent owner Ronald Patterson, to cover estimated construction and initial operating costs of $273,000 but was unable to show in response to a Commission inquiry that, at the time of certification, its purported lender had the necessary financial resources to meet his commitment. *Id.* at 8480 § 9. Malvin's assets were primarily non-liquid real estate holdings, which Capitol had not shown were readily convertible into cash at the time of its financial certification. *Id.* at 8480-81 § § 9, 10. Capitol had not substantiated the claimed value of Malvin's holdings with valid appraisals, affidavits, or any documentary support for the alleged comparable sales and informal appraisals upon which it claimed Malvin relied. *Id.* at 8481 § § 10-11. Even assuming the value of Malvin's assets were as claimed, Malvin would have to generate funds from those assets. The Commission looked to the ratio of the claimed value of all the non-liquid assets, including those subject to encumbrances, to the funds needed from the sale of those assets, and found it was roughly 3.13: 1, an amount below what had been deemed acceptable in other cases. *Id.* § 12. Because Malvin's "1988 financial statement does not establish that at the time of certification Malvin Patterson had sufficient net liquid assets or readily convertible non-liquid assets to meet the financial requirements of the application," *id.*, the Commission designated an issue to determine whether Capitol City was financially qualified to be a Commission licensee at the time it certified to its qualifications.[1]

3. The ALJ concluded it was not. "In fact, and based on the evidence adduced on remand, Capitol City was in far worse financial condition at certification time than they had led the Commission to believe they were." *SID* at 2803 find. 20. The ALJ explained, "[T]he most, the very most, that Capitol City could substantiate in non-liquid real estate for Malvin Patterson was $401,880. That $401,880 consisted of $238,630 in income producing property and $163,350 in non-income producing property." *Id.* find. 22. This substantiation was based on 1994 drive-by appraisals of the 1994 market value of some of Malvin's properties, for Capitol City provided no appraisals to support the claimed 1988 value of the properties. *Id.* n.2, 2805 concl. 6. Even if this $401,880 value is accepted, "[t]he ratio of the value of non-liquid assets ($401,880) to the additional funds those assets must yield ($243,000) is 1:65 to 1, clearly an insufficient ratio" under past Commission precedent. *Id.* at 2803 find. 23.

4. The ALJ rejected Capitol City's argument that Malvin's borrowing capacity is the appropriate test, rather than the ratio of assets to funds needed. The ALJ explained: "Based on his past banking experience, Ronald Patterson asserts that his father could borrow up to 70% of the value of his rental and investment properties." *Id.* find. 24. The ALJ rejected this as "bare unsupported opinion," *id.*, and because, even if the test were credited, "Capitol City would fail it. The record shows that in 1988 Malvin Patterson owned $238,630 worth of income producing real estate. 70% of $238,630 is $167,041, about $76,000 short of the $243,000 required." *Id.* find. 25 (citation omitted).

5. Capitol City does not dispute that it relied on Malvin Patterson's commitment letter, that Malvin's assets consisted primarily of real estate for which there were no appraisals supporting Malvin's commitment, or that the ratio of Malvin's assets to the funds committed was less than the Commission had found acceptable in other cases,

[1] The Commission also designated issues to determine whether Capitol City "is presently financially qualified," whether it "falsely certified its financial qualifications," and whether it "made misrepresentations [or] lacked candor before the Commission concerning its financial qualifications." *MO&O*, 8 FCC Rcd at 8483 ¶ 24.

even at the valuation Malvin placed on the holdings. Capitol City Brief at 2-3. Capitol City argues, nonetheless, that it had reasonable assurance of sufficient funds, *id.* at 4:

> [T]he combination of Ronald Patterson's extensive experience and expertise in commercial banking and, in particular, bank lending practices and his personal familiarity with his father's real estate holdings and general creditworthiness were sufficient to provide him, and Capitol City, with a reasonable basis for believing that Malvin Patterson would be able to raise the funds that he had promised to lend to Capitol City on the strength of his personal assets.

6. Capitol City argues, and the ALJ found, that Ronald Patterson had an extensive banking background which included commercial lending experience. *SID* at 2802 find. 8-9. In Ronald's judgment as a banker, which he was at the time he certified to Capitol City's financial qualifications, Malvin "could readily borrow up between 70% and 75% of the value of his rental and investment properties as they were generating more than enough income to service such a loan and also cover insurance and taxes," the common test applied by commercial banks, according to Ronald. Capitol City Brief at 11. Capitol claims that a loan based on 70% of the value of Malvin's income producing properties, which were shown to total $414,500 in Malvin's 1988 Financial Statement, would yield $209,027 after paying off existing mortgages. In addition, Capitol claims that Malvin had an additional $52,744 available from cash on hand and in banks, cash surrender value of insurance and marketable securities that were traded on the New York Stock Exchange. The total funds Capitol City claims Malvin could raise, $261,771, exceeded the amount Capitol City needed to be financially qualified by $14,199. Capitol City Brief 12-13.

7. Capitol City also claims that under Commission precedent in *Port Huron Family Radio, Inc.*, 5 FCC Rcd 4562 (1990), and *Dodge-Point Broadcasting Co.*, 11 FCC 2d 751, *recon. denied*, 13 RR 2d 274 (1968), it could rely on two-thirds of the value of real estate and other non-liquid assets as a source of available funds. Applying this calculation to the value of the real estate listed on Malvin's 1988 Financial Statement and excluding the value of Malvin's homestead and three rental properties that Ronald did not rely on at certification, the yield would be $306,348.65. Capitol City Brief at 14-15, citing Bureau Exh. 14 at 9-10. When this is added to Malvin's $52,744 in liquid assets and total encumbrances of $81,123 are subtracted, Capitol City could rely on Malvin being able to lend it $277,969.65 on the strength of his 1988 Financial Statement.

8. Capitol City concedes, "The valuations for Malvin Patterson's real estate holdings were not based on formal appraisals, but rather were based on Malvin Patterson's personal evaluation of what the properties were worth." Capitol City Brief at 13. According to Capitol City:

> Malvin Patterson has extensive experience in owning and managing real estate in Texarkana, Arkansas, and he made it [] his practice to stay current as to the values of the properties that he owned and to up-date his financial statement to reflect current values. He did this by keeping track of sales of comparable properties and by obtaining estimates from people that he knew who were regularly selling or trading real estate.

Id., citing Capitol City Exh. 2 at 2; tr. 568. Capitol City argues that applying Ronald Patterson's banking expertise to Malvin Patterson's holdings

> was at least as *reasonable* as the *assurance* that he would have derived had he taken his father and his father's financial statement to a bank with which his father had a relationship and obtained a letter from such bank that it would lend Capitol City the funds it required on the security of the assets listed on his father's financial statement subject to the valuations of the assets being substantiated by appraisals at the time of the loan.

Capitol City Brief at 16-17 (emphasis in original). Because self appraisals of assets underlie virtually every bank reasonable assurance letter, Capitol City argues, it would be arbitrary and capricious to reject Ronald Patterson's determination as a banker simply because the valuations on Malvin's financial statement were not supported by appraisals. *Id.*

9. The Bureau disagrees that Capitol City can rely on the self-serving opinion of Ronald Patterson as to the availability of funds. It also disagrees that Capitol City can rely on self-appraisals for the claimed value of Malvin Patterson's real estate, and it generally questions the reliability of Malvin's property appraisals, arguing that appraisals made in 1994 were significantly below the values Malvin assigned to the properties in 1993 when it sought a bank letter.[2] But, even if the 1994 appraisals can be used as the closest approximation of Malvin's income producing properties in 1988, these do not show that Capitol City had sufficient funds available, even under its theory that it could borrow seventy percent of the value of the income-producing properties. The Bureau also argues that Capitol City cannot rely on *Dodge-Point* and *Port Huron* because there were no appraisals of real estate holdings, an essential requirement in both cases. Finally, the Bureau challenges Capitol City's analogy to bank letters because there has been no decision by an independent financial institution, and Ronald Patterson's banking experience and knowledge of his father's holdings does not substitute for the assessment of an independent third party contemplated by the Commission.

[2] Capitol City has conceded that, on average, the 1994 appraisal values were eight percent less than the values Malvin had placed on his properties in his 1993 financial statement. Capitol City Reply to Mass Media Bureau Proposed Findings of Fact and Conclusions of Law, June 10, 1994, p. 4.

DISCUSSION

10. When it filed its application, Capitol City certified to its financial qualifications by certifying that "sufficient net liquid assets are on hand or sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue." Capitol City Application, FCC Form 301, Sec. III, Bureau Exh. 1, p. 6. *See generally Northampton Media Associates*, 4 FCC Rcd 5517, 5519 § 15 (1989), *aff'd*, 941 F.2d 1214 (D.C. Cir. 1991). Although Capitol City repeatedly told the Commission that Malvin Patterson had sufficient net liquid assets for his commitment, this was admittedly not the case, *see MO&O*, 8 FCC Rcd at 8480 § 6, 8482 § § 17-18, and the question heard was whether Capitol City had adequate committed sources of funds available to it. *Id.* at 8482 n.25. Capitol City bore the burden of proving its financial qualifications by a preponderance of the record evidence. *MO&O*, 8 FCC Rcd at 8483; *see Steadman v. SEC*, 450 U.S. 91 (1981). To meet its burden, it was required to provide probative or substantial and reliable evidence. *Northampton* § 15.

> Probative evidence necessarily includes something more than the self-serving, uncorroborated statement of the individual responsible for the certification that he had taken steps to secure the needed funds. . . . Where the lender is not a financial institution but a person, as in this case, the applicant must show that the person proposing to lend the funds had the necessary financial resources at that time.

Id. at § 16. This it has failed to do.

11. In Capitol City's view of the case, it could rely on a percent of the value of Malvin Patterson's non-liquid assets as being readily available for the purpose of a financial certification under the precedent from *Port Huron*, 5 FCC Rcd 4562, and *Dodge-Point*, 11 FCC 2d 751. The Commission had rejected this argument in its remand order because Capitol City had failed to show at that point that "these assets were readily convertible into cash at the time of certification." *MO&O*, 8 FCC Rcd at 8481 § 10. Although allowed the opportunity to reconstruct the basis for its financial qualifications by the remand, *see Port Huron; Northampton* at 5519 § 18,[3] Capitol City never showed the marketability and ready liquidity of Malvin's real estate assets with valid appraisals, the essential condition for this theory of the case. *See American Cellular Corp.*, 103 FCC 2d 26, 28 § 5.c. (1986) ("Evidence must be submitted to establish the fair market value of non-liquid assets such as real estate. *Chicago Land TV Co.*, 11 FCC 2d 96, 104 (1967). Precedent also establishes that two-thirds of the appraised value of real estate may be credited in a net liquid asset analysis if the marketability of such real estate is documented." (additional citations omitted)); *Christian Children's Network, Inc.*, 101 FCC 2d 612, 614 (1985) ("we allow an entity which plans to lend money to an applicant to demonstrate the availability of such funds by relying upon projected proceeds from real estate, if it provides relevant appraisals and specifies the mortgages held against those real estate assets, without regard to the specific net worth ratio."), *rev. denied*, 2 FCC Rcd 7395, *aff'd by judgment*, 872 F.2d 496 (1989); *Rose Broadcasting Co.*, 68 FCC 2d 1242, 1246 (1978) (valid appraisal indicating that proceeds of sale of real property would yield sufficient funds to meet commitment to applicant demonstrated financing ability); *Texas Communications Limited Partnership*, 5 FCC Rcd 5876, 5878 § § 11, 12 (Rev. Bd. 1990) (professional appraisals submitted for illiquid assets), *rev. denied*, 6 FCC Rcd 5191, 5192 § 11, 5193 §14 (1991) (credit given only for asset values supported by appraisals in the record), *aff'd sub nom. CHM Broadcasting Limited Partnership v. FCC*, 24 F.3d 1453 (D.C. Cir. 1994). The need for an appraisal establishing the marketability and liquidity of the assets relied on is made clear in *Dodge-Point*. In *Port Huron*, the applicant relying on a lender who was a friend, not a financial institution, was asked to submit documentation supporting the friend's ability to provide the needed funds. The applicant submitted an appraisal of the value of real estate. In contrast, when asked for documentation in this case, Capitol City offered only Malvin's self-serving, self-appraisal and Ronald's self-serving statement that he was familiar with his father's assets. There still are no independent appraisals of the 1988 property values.[4]

12. Capitol City admits the lack of appraisals contemporaneous with its certification, but argues it made a sufficient showing because, according to Malvin and Ronald, Malvin kept up on the values of his properties and talked informally with real estate people.[5] "This type of self-serving and cursory documentation cannot be credited." *Coastal Bend Family TV, Inc.*, 94 FCC 2d 648, 656 n.9 (Rev. Bd. 1983) (real estate commission employee's own superficial appraisals of his real estate holdings not credited), *modified and remanded on other grounds sub nom. Christian Children's Network, Inc.*, 101 FCC 2d 612 (1985); *see Donald E. Hilgendorf*, 4 FCC Rcd 5004 (Rev. Bd. 1989)

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[3] The Commission's view that applicants filing before the effective date of the explicit policy change in *Revision of Application for Construction Permit for Commercial Broadcast Station*, 4 FCC Rcd 3853 (1989), need not have documentation for their financial qualifications when certifying was criticized in *Northampton Media Associates v. FCC*, 941 F.2d 1214, 1216-17 (D.C. Cir. 1991), but reaffirmed by the Commission in *Emision de Radio Balmaseda, Inc.*, 8 FCC Rcd 4335 (1993).

[4] Capitol City also complains that Malvin Patterson's securities should have been credited as liquid assets. *See MO&O* at 8481 n.17 (financial statement does not show that stocks and bonds are readily marketable). According to Capitol City, the stocks are traded on the New York Stock Exchange and the mutual fund is publicly traded. "Publicly traded" securities have been credited in *Sherry Rullman*, 2 FCC Rcd 2011, 2014 ¶ 21 (Common Carrier Bur. 1987) (term "liquid assets" includes "publicly-traded securities"); *Capitol City Community Interests, Inc.*, 2 FCC Rcd 1984, 1985 ¶ ¶ 8-9 (Rev. Bd. 1987) (same); *Krisar, Inc.*, 1 FCC Rcd 1007, 1008-09 (Common Carrier Bur. 1986) ("generally, only publicly-traded securities may be used to ascertain an applicant's current assets"). However, that Malvin's securities are publicly traded could not be discerned from the face of Malvin's financial statement, and Capitol City has not shown where this information was introduced into evidence.

[5] In his written direct testimony, Malvin Patterson said, "I make it a point to stay current with real estate values in the areas in which I own properties. I do this by keeping track of property sales." Capitol City Exh. 2, second page. On cross-examination he elaborated, "I usually compared property -- similar properties in the area and I usually got estimates from friends of mine who were regularly selling real estate or trading real estate and I thought I had a pretty good knowledge of what it was worth -- " Tr. 568.

(where applicant stated his view of the values of non-liquid assets, application was remanded for documentation, including appraisals); *see also Northampton*, 4 FCC Rcd at 1519 (probative evidence required); *Sunshine Broadcasting, Inc.*, 6 FCC Rcd 5981, 5983 § 8 (Rev. Bd. 1991) (testimony that individual lenders had sufficient net liquid assets, without documentation, was not sufficient to establish financial qualifications), *recon. denied*, 7 FCC Rcd 493 (Rev. Bd. 1992). In this case, there is no evidence of any factual basis for Malvin's valuations from which the Commission can evaluate Malvin's claim. *Compare Kaye-Smith Enterprises*, 98 FCC 2d 675 (Rev. Bd. 1984) (applicant's self-appraisal was supported by evidence of a sales contract that fell through and of a recent comparable sale for one of the properties) (subsequent history omitted). Thus, even if Malvin could be viewed as akin to an expert witness, in spite of his lack of objectivity and lack of documented real estate credentials, there is no record basis from which an expert opinion could be rendered or tested.

13. The Commission has been more lenient with respect to the showing of liquidity or marketability where the value of non-liquid assets is substantially greater than the needed funds from those assets, expressed as a ratio of assets to funds needed. But even when "the sheer magnitude" of the difference between claimed assets and needed funds is substantial, some independent basis for the claimed valuation is required. *See, e.g., Real Life Educational Foundation of Baton Rouge, Inc.*, 8 FCC Rcd 2675, 2676 (1993) (showing in response to FCC inquiry of $23 million in real estate assets based on purchase prices of parcels was sufficient to establish ability to construct station with estimated costs of $200,000, even in light of unreported judgments and liens; purchase prices were supported by affidavit); *Enterprise Broadcasting, Inc.*, 56 FCC 2d 352, 354-55 (1975) ("Although the applicant is ordinarily required to show the liquidity and marketability of fixed assets relied upon, where a small amount of money is to be obtained from a non-liquid asset with a much larger appraised worth, the Commission and the Board have consistently held that the applicant will be able to secure the necessary funds."). The Commission and the ALJ considered whether Capitol City's financial qualifications could be presumed by employing this ratio but found insufficient assets, even assuming the values most favorable to Capitol City. *See MO&O*, 8 FCC Rcd at 8481 § 12; *SID* at 2803 find. 23. Capitol City concedes that it cannot prevail under this analysis.

14. Capitol City's evidentiary deficiency in this case cannot be overcome by the argument that, in Ronald Patterson's judgment, if Malvin Patterson were to go to a financial institution to borrow the money he has promised to Capitol City, an institution would lend the money. The test for determining reasonable assurance of a loan from a financial institution is not whether the borrower has any reason to think he might qualify for a loan if he were to approach a bank, but whether the borrower has dealt with the bank and provided it with sufficient information for an informed decision on the bank's part about providing reasonable assurance of a loan.[6] *See Isis Broadcast Group*, 7 FCC Rcd 5125, 5128-29 § § 16-17 (Rev. Bd. 1992), *rev. denied*, 8 FCC Rcd 7040, 7040 n.2 (1993), *recon. dismissed*, FCC 93I-071 (rel. Dec. 8, 1993). It is well established that a borrower relying on a bank loan must show that it provided the bank with the financial data upon which the bank could review the loan request, that the bank did so, and that the bank is satisfied with the data. *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990); *see Liberty Productions, a Limited Partnership*, 7 FCC Rcd 7581, 7584 § 23 (1992). Here, no lender had been approached at all, let alone shown data about Malvin's plans for the money, credit history, and purported security for the loan. Ordinarily the lack of any substantive contact between the borrower and the bank would be dispositive of the financial qualifications issue. *Isis*, 7 FCC Rcd at 5127 § 8. Capitol City argues that contact with a bank is unnecessary in this case because, in Ronald's opinion as a bank president, Malvin could have easily borrowed up to seventy percent of the value of his real estate assets. The only evidence of this, however, is Malvin's self-serving and undocumented opinion of the value of his assets and Ronald's self-serving opinion that an unidentified bank would have loaned the money if asked in 1988.[7] "If wishes were horses, beggars might ride." Ray, John, English Proverbs. This does not meet the requirement that, when bank funds are relied on for an applicant's financial qualifications, the bank has first provided the borrower with reasonable assurance of funding on the basis of data satisfactory to it. *Marlin Broadcasting of Central Florida*, 5 FCC Rcd 5751, 5751 (1990). "'It is not sufficient for an applicant to simply believe that it will be financially qualified by the time it obtains a construction permit.'" *Dutchess Communications Corp.*, 101 FCC 2d 243, 246 & n.4 (Rev. Bd. 1985) (quoting FCC Brief in *James L. Oyster v. FCC*, No. 84-1562 (D.C. Cir. 1984), at 10); *Pepper Schultz*, 103 FCC 2d 1052,

[6] A binding legal certainty of a loan is not required. *Las Vegas Valley Broadcasting Co. v. FCC*, 589 F.2 594, 599-601 (D.C. Cir. 1978).

[7] Capitol City argues that Ronald's view of commercial banking lending practices was corroborated by the written testimony of Lloyd C. Champion, Executive Vice President of the First National Bank of Texarkana, Arkansas, which said that he had written Malvin Patterson on July 21, 1993, advising him that "the Bank was willing, in principal, to lend Mr. Patterson up to $275,000 on the security of his personal assets." Capitol City Exh. 3, ¶ 1. According to Mr. Champion, at ¶ 3:

> Before issuing the Letter, I reviewed Mr. Patterson's financial statement and concluded that, if Mr. Patterson's assets, especially his rental properties were as presented on his financial statement, it was possible that the Bank would be able to lend $275,000 against those assets. I reached this conclusion based on the fact that the Bank will lend up to 70% of the appraised value of income producing real estate and on the assumption that: (i) appraisals would confirm the aggregate value of the properties stated on the financial statement; (ii) the income stream from the properties at the time of the loan would [sic] sufficient to service the loan after covering taxes and insurance; and (iii) Mr. Patterson's overall credit record was good.

The statement does not indicate whether the general criteria used in 1993 are the same as those the bank used in 1988 and, therefore, is of little weight as corroboration for Ronald Patterson's view of the general availability of commercial loans when Capitol City certified to its financial qualifications.

1059 (Rev. Bd. 1986) (applicant may not certify finances and then arrange financing, quoting FCC *Oyster* brief in *Dutchess).*

15. Finally, Capitol City argues that it would be arbitrary and capricious to reject Ronald Patterson's determination as a banker simply because there are no independent appraisals of Malvin's 1988 assets, when banks accept self-appraisals of assets for their reasonable assurance letters. This argument fails to recognize that Ronald's opinion here is not being given as Malvin's banker or on behalf of any bank considering a loan to Malvin. Ronald is the applicant and must establish Capitol City's financial qualifications by probative evidence, which, consistent with *Northampton,* 4 FCC Rcd at 5519 § 16, must be something more than the applicant's uncorroborated, self-serving opinion. An applicant like Capitol City, who admittedly lacks sufficient net liquid assets to fund the station, needs some objective assurance that the needed funds will be available. Where the applicant relies on non-liquid assets, the applicant must assure itself -- and the Commission, if asked -- that the assets can be turned into sufficient funding when the time comes for building the station. If the assets are expected to become liquid through a sale, then an independent appraisal of their marketability and likely value at the time of the applicant's certification is needed, unless the ratio of assets to needed funds is high enough to create the presumption that funds can be generated from the assets, and the value is documented in some fashion. If the assets are to generate funding through a bank loan, then a bank's precertification reasonable assurance of the loan -- after having reviewed all the data relevant to the bank, not just the asset values -- is needed. Although Capitol City appears to be complaining that the standards are more rigorous in one circumstance than the other, or perhaps being misapplied in this case, the Commission requires reasonable assurance appropriate to the applicant's financial proposal. It will accept a bank's judgment subject to future appraisals of collateral, if there has been a sufficient enough dialogue between the borrower and the bank that the latter has a "present firm intention to make [the] loan, future conditions permitting." *Merrimack Valley Broadcasting, Inc.,* 82 FCC 2d 166,167 (1980). Of course, if there is reason to question whether the bank's assurance was based on adequate or accurate information, this doubt must be dispelled before the applicant can be found to be financially qualified. *See, e.g., Sound Broadcasting Co.,* 6 FCC Rcd 3626, 3627-28 § 10 (Rev. Bd. 1991).

16. The problem in this case, however, is not an arbitrary requirement that Capitol City support a banker's reasonable assurance with appraisals that have not been required for bank letters in other cases. The problem is that, when questioned about the basis for its financial certification, Capitol City responded in a way that created confusion as to whether it was relying on Malvin Patterson's assets directly or whether it was relying on a bank loan secured by those assets. It has failed to provide the appropriate documentation to support either basis. Ronald Patterson's confidence in his father's ability to get financing may be relevant to the false certification and misrepresentation issues designated against Capitol City, but this does not substitute for probative evidence showing that belief in Malvin Patterson's financial qualifications was objectively founded. *See Maria M. Ochoa,* 7 FCC Rcd 6569, 6573 (Rev. Bd. 1992) (a good faith belief is not sufficient to establish financial qualifications); *Margaret Escriva,* 6 FCC Rcd 5391, 5192 (Rev. Bd. 1991) (same); *Pepper Schultz,* 103 FCC 2d at 1058-59.

CONCLUSION

17. Because the record lacks probative evidence that Capitol City had reasonable assurance of adequate financing from Malvin Patterson, its exclusive source of funding when it certified to its financial qualifications in 1988, the Board cannot find that Capitol City was financially qualified when it filed its application. Thus, Capitol City's application must be denied. For this reason, the issue of Capitol City's current financial qualifications is nondecisional, and we need not reach it. *See MO&O,* 8 FCC Rcd at 8481 n.22 (a belated financial proposal cannot be considered absent a demonstration that the applicant had reasonable assurance of financing at time of certification), citing *Aspen FM,* 6 FCC Rcd 1602, 1603-04 § 13 (1991). Likewise, we need not reach the issue of Capitol City's basic character qualifications.[8] *See Isis,* 7 FCC Rcd at 5128 § 14 and cases cited therein. *See also Colonial Communications, Inc.,* 6 FCC Rcd 2296, 2296 § 3 (1991) ("An agency, like a court, need not decide questions which are not relevant to its decision.") (subsequent history omitted).

18. ACCORDINGLY, IT IS ORDERED That the application of Capitol City Broadcasting Company (File No. BPH-880812MZ) IS DENIED.

19. IT IS FURTHER ORDERED That the Request for Oral Argument filed by Capitol City Broadcasting Company on August 5, 1994, IS DENIED.[9]

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[8] We note that both parties to the hearing below oppose the ALJ's adverse findings on the designated false financial certification and misrepresentation/lack of candor issues. In addition to arguing that it has always been financially qualified, the applicant contends that the Commission has itself used "net liquid assets" to refer to assets generally regarded as illiquid. It was Capitol City's repeated, inaccurate representation that Malvin Patterson had sufficient net liquid assets that led to designation of the issues. The Bureau contends that deceitful intent was not shown. Deceitful intent is a prerequisite for finding willful misrepresentation. *See, e.g., Fox River Broadcasting, Inc.,* 93 FCC 2d 127, 129 (1983).

[9] It does not appear that oral argument would materially assist in the resolution of the issues presented. *See* 47 C.F.R. § 1.277(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-150

In re Applications of

FRANK DIGESU, SR.	File No. BPH-880126ME
VIRGINIA GRIFFITH	File No. BPH-880127MN
LINDA L. ALT	File No. BPH-880128MO
KPI COMMUNICATIONS, INC.	File No. BPH-880128MW

For Construction Permit for
New FM Station, Channel 231A
Meridianville, Alabama

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1994; Released: December 20, 1994

By the Review Board: MARINO (Chairman) and GREENE.

1. The Review Board has before it for consideration a Joint Petition for Approval of Settlement Agreements, filed August 25, 1994 by Frank Digesu, Sr. (Digesu), Linda L. Alt (Alt), and KPI Communications, Inc. (KPI); two Supplements to the Joint Petition, filed September 1 and 21, 1994 by Alt and KPI, respectively; a Joint Request for Approval of Settlement Agreement, filed October 4, 1994 by Digesu and Virginia Griffith (Griffith); a Petition for Leave to Amend, filed October 4, 1994 by Digesu; a Supplement to the Petition, filed October 11, 1994 by Digesu; Consolidated Comments in support of the agreements, filed October 31, 1994 by the Chief, Mass Media Bureau; and a further Supplement to the Petition, filed November 9, 1994 by Digesu.

2. In this proceeding, the Board granted Griffith's application for a new FM radio station in Meridianville, Alabama and denied the competing applications of Digesu, Alt, and KPI. *Frank Digesu, Sr.*, 7 FCC Rcd 837 (Rev. Bd. 1992). On review, the Commission, without reaching the comparative issue, found that there was a substantial and material question relating to Griffith's basic qualifications and therefore remanded for further hearing to determine whether Griffith made misrepresentations or lacked candor before the Commission. *Frank Digesu, Sr.*, 7 FCC Rcd 5459 (1992). In a Supplemental Initial Decision (S.I.D.), 8 FCC Rcd 3192 (ALJ 1993), Administrative Law Judge John M. Frysiak determined that Griffith was disqualified under the remanded issue and that Digesu was now the comparative winner.

3. The settlement agreements submitted to us provide for the dismissal of the Alt, KPI, and Griffith applications and grant of the Digesu application, as amended. In consideration for dismissal of their applications, Digesu will pay $75,000 to Alt, $80,000 to KPI, and $75,000 to Griffith. The Digesu application will be amended to substitute Digesu Broadcasting, Inc. (DBI) as the winning applicant. DBI will be owned 60% by Digesu, 20% by R. Parker Griffith, the husband of Virginia Griffith, and 20% by Thomas H. Griffith, the brother of R. Parker Griffith. The Griffith brothers will acquire their interests from Digesu for $100,000. Virginia Griffith will have no ownership or other role in the new station. The Griffith brothers will lend DBI $380,000 to cover construction and initial operation costs as well as the payments to the dismissing applicants. Furthermore, the Griffiths will have an option to purchase Digesu's 60% interest in DBI for $300,000 within three months after the station goes on the air and, in turn, Digesu may sell his interest to the Griffiths for $300,000 within the same period. Also, Digesu may buy the Griffiths' 40% share for $200,000 prior to the time when they are permitted to exercise their option.

4. We will grant the requests before us because they comply with the provisions of 47 U.S.C. § 311(c) and 47 C.F.R. § 73.3525(a) which govern settlement agreements. Thus, the dismissing parties have stated under penalty of perjury that there is no other consideration for dismissal of their applications, that they did not file their applications for the purpose of entering into a settlement agreement, and that approval of the agreements will serve the public interest by hastening the inauguration of a new broadcast service to Meridianville, Alabama. Alt, KPI, and Griffith have also submitted documentation demonstrating legitimate and prudent expenses in the preparation and prosecution of their applications in excess of their reimbursement under the agreements. Insofar as the Griffiths retain an option to purchase Digesu's 60% interest in DBI after the station goes on the air, any future transaction involving an actual transfer of control of the station would, of course, be reportable to the Commission and subject to prior Commission approval under 47 U.S.C. § 310(d). *See Lamar Communications, Inc.*, 6 FCC Rcd 7022 (OGC 1991).

5. Digesu's amendment also includes a technical proposal which incorporates changes in the station's proposed transmitter site, ERP, and height above average terrain. This technical amendment has been studied by the Mass Media Bureau's engineering staff which has determined that it complies with all relevant Commission rules. Moreover, in its most recent amendment supplement, Digesu has submitted an FAA Acknowledgement of Notice of Proposed Construction or Alteration which states that the new station's tower proposal will not constitute a hazard to air navigation.

6. The proposed amendment also contains a duopoly showing because the Griffith brothers co-own Griffith Broadcasting, Inc., the licensee of Station WTAK-FM, Huntsville, Alabama, and R. Parker Griffith also wholly owns Station WDJL(AM), Huntsville. The proposed Meridianville station will serve the Huntsville market. The 3.16 mV/m contour of the proposed station will overlap the 3.16 mV/m contour of WTAK-FM, and the 5 mV/m contour of WDJL(AM) will overlap the city-grade contour of both the existing and proposed FM stations. The showing indicates that the common ownership of the overlapping stations will not violate 47 C.F.R. § 73.3555(a) because there are more than fifteen radio stations within the market and WTAK-FM and WDJL(AM) together have an audience share of far less than the 25 percent allowable maximum.

7. Finally, Digesu and Griffith request that we vacate the findings and conclusions of the S.I.D. so that the parties are not prejudiced by future application of a decision that has not been subject to full judicial review. We agree with the applicants that it is the Commission's "customary practice" to vacate an agency decision "where matters become moot before the completion of review." *Susan S. Mulkey*, 6 FCC Rcd 1814, 1815 n.3 (OGC 1991); RKO General, Inc. (WRKO), 3 FCC Rcd 6603, 6604 n.6 (1988). We will follow this well-established and judicially approved practice here. *See Shawn Phelan*, 7 FCC Rcd 7638 (1992) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 38-40 (1950); and *Boston Community Media Committee Minority Caucus v. FCC*, 509 F. 2d 516, 517 (D.C. Cir. 1975)).

8. ACCORDINGLY, IT IS ORDERED, That the Joint Petition for Approval of Settlement Agreements, filed August 25, 1994, as supplemented September 11 and September 21, 1994, by Frank Digesu, Sr., Linda L. Alt, and KPI Communications, Inc., and the Joint Request for Approval of Settlement Agreement, filed October 4, 1994 by Frank Digesu, Sr. and Virginia Griffith ARE GRANTED and the attached settlement agreements ARE APPROVED; that the Petition for Leave to Amend, filed October 4, 1994, as supplemented October 11 and November 9, 1994, by Frank Digesu, Sr. IS GRANTED and the amendment IS ACCEPTED; that the Exceptions, filed June 14, 1993 by Virginia Griffith and Linda L. Alt ARE DISMISSED; that the Supplemental Initial Decision, 8 FCC Rcd 3192 (ALJ 1993), IS VACATED; that the applications of Linda L. Alt, (File No. BPH-880128MO), KPI Communications, Inc. (File No. BPH-880128MW), and Virginia Griffith (File No. BPH-880127MN) ARE DISMISSED; that the application of Frank Digesu, Sr. (File No. BPH-880126ME), as amended, IS GRANTED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic
Telephone Companies

Southwestern Bell
Telephone Company

Petitions for Waiver of
Section 69.4(b) of the
Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1994; Released: December 6, 1994

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On December 7, 1993, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a petition for waiver of Section 69.4(b) of the Commission's Rules, 47 C.F.R. § 69.4(b), which provides that local exchange carrier (LEC) charges for access services shall include certain specified rate elements.[1] Bell Atlantic seeks a waiver to establish three additional rate elements for certain operator call completion services that it plans to offer interexchange carriers (IXCs). The three rate elements proposed by Bell Atlantic are: (1) automated calling card handling; (2) automated collect and billed to third number handling; and (3) live operator handling.[2] On May 13, 1994, Southwestern Bell Telephone (SWB) also filed a petition for waiver of Section 69.4(b) to offer certain similar call completion services for IXCs called "Designated Operator Services" (DOS).[3] SWB seeks a rule waiver to establish seven additional rate elements for this service: (1) automated call processing; (2) operator assistance call processing; (3) call recording; (4) call rating; (5) call branding; (6) DOS access order charge; and (7) service modifications.[4]

2. The operator call completion services contemplated by Bell Atlantic and SWB (Petitioners) would provide IXCs with live and automated operator assistance with such tasks as the handling of collect, calling card, and billed-to-third number calls.[5] Petitioners contend that these proposed services will provide IXCs with additional call-handling capabilities and will provide consumers with new sources of operator-assisted calling services.[6] Bell Atlantic adds that the offerings will enable IXCs to offer operator-assisted calling services to consumers in competition with existing operator service providers, thereby increasing the number of services such providers can make available to consumers. Accordingly, Bell Atlantic argues that the availability of these proposed services will increase consumer choices, foster competition among IXCs, and thus serve the public interest.[7]

II. CONTENTIONS OF THE PARTIES

A. Demand and Competition Issues

3. Sprint and MCI claim that the requested waivers would not be in the public interest because the Petitioners fail to identify any public demand for their proposed services.[8] In addition, given the large number of operator service providers already in the market, MCI questions the benefit of either Petitioner's entry into this market in light of alleged risks that Petitioners would engage in anticompetitive conduct.[9]

4. For example, MCI claims SWB's offering would frustrate competition and eventually reduce customer choices because of SWB's control of "bottleneck" facilities and its ability to cross-subsidize competitive operator services with revenues from its less competitive regulated services. MCI contends that such anticompetitive risks are increased in this case because SWB has not yet explained how it will treat these proposed services under price cap regulation.[10] Also, in view of the large number of existing operator service providers and the absence of demonstrated demand for SWB's proposed services, both MCI and Sprint challenge SWB's assertions that the availability of its new services will increase customer choices.[11] In addition, MCI contends that Bell Atlantic's proposed operator services would involve performance of interLATA functions prohibited by the line of business restrictions in the Modification of Final Judgment (MFJ).[12] MCI therefore urges that

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[1] Comments on the Bell Atlantic Petition were filed on February 24, 1994, by BellSouth Telecommunications, Inc. (BellSouth), MCI Telecommunications Corporation (MCI), and Sprint Communications Co., L.P. (Sprint). Bell Atlantic and Southwestern Bell Telephone Company (SWB) filed reply comments on March 11, 1994.

[2] Bell Atlantic Petition at 2.

[3] MCI and Sprint filed comments on the SWB Petition on May 31, 1994. To its comments on the SWB Petition, Sprint attached and incorporated its earlier comments on the Bell Atlantic Petition. On June 9, 1994, SWB and Bell Atlantic filed replies to the comments on the SWB Petition.

[4] SWB Petition at 4-5.

[5] *See, e.g.*, Bell Atlantic Petition at 1-2.

[6] Bell Atlantic Petition at 1; SWB Petition at 1-2.

[7] Bell Atlantic Petition at 2.

[8] MCI Comments (Bell Atlantic Petition) at 2; Sprint Comments (Bell Atlantic Petition) at 2-4; MCI Comments (SWB Petition) at 4-5; Sprint Comments (SWB Petition), Attachment at 2-3.

[9] MCI Comments (Bell Atlantic Petition) at 3; MCI Comments (SWB Petition) at 3-4.

[10] MCI Comments (SWB Petition) at 3-5 (contending that placing these services in the price cap basket for traffic sensitive services could lead to cross-subsidization within that basket).

[11] MCI Comments (SWB Petition) at 2-4; Sprint Comments (SWB Petition) at 1-2.

[12] U.S. v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. U.S.*, 460 U.S. 1001 (1983).

Commission action on Bell Atlantic's waiver request be deferred pending an MFJ waiver or a decision that such a waiver is not required.[13]

5. SWB responds to MCI's competitive concerns by explaining that its proposed operator service offering is independent of SWB's local call origination facilities. SWB explains that calls requiring its proposed operator services would be delivered by the subscribing IXC to SWB's DOS center in the Kansas City Local Access and Transport Area (LATA). SWB would then return the call to the carrier's facilities in the same LATA for routing and transport to the final destination.[14] Bell Atlantic claims its offering will encourage competition by enabling IXCs that may lack the necessary resources to offer a more complete range of calling services to their customers.[15]

6. Regarding the alleged absence of demand information in its petition, Bell Atlantic contends such information is not part of the Commission's requirement for waiver of Part 69. Nonetheless, Bell Atlantic reports that at least three carriers have expressed an interest in its proposed service and that it anticipates that more substantial demand will result from marketing efforts. With regard to MCI's MFJ arguments, Bell Atlantic observes, *inter alia*, that the Commission has declined to entertain such arguments.[16]

7. SWB agrees with Bell Atlantic that no showing of demand or identification of customers is necessary to obtain a Part 69 waiver; nevertheless, SWB states that target customers for its proposed services include any carrier that offers its customers operator call completion services and that obtains these services from a third-party provider.[17] Citing Commission data, SWB also contends that 1986-1993 growth in the number of carriers purchasing equal access and in the number of operator service providers demonstrates a significant increase in the number of competitors and, thus, greater competition in the provision of long distance and related operator services during that period.[18]

B. Cost Issues

8. Sprint asserts that Bell Atlantic and SWB fail to demonstrate that they will establish rates that recover relevant costs in accordance with the cost support requirements of the *Southwestern Order*.[19] Sprint also claims that it is not evident that the volume and term discounts contemplated by Petitioners for these operator services would be warranted on the basis of relevant costs.[20] Petitioners reply that the Commission does not require such cost showings to support a Part 69 waiver and that such issues can be subsequently addressed when tariff transmittals are filed.[21]

C. Other Issues

9. MCI and Sprint contend Petitioners fail to meet the "good cause" standard for waiver of a Commission rule.[22] Specifically, Sprint contends that Petitioners fail to show that application of the Part 69 rules would produce unanticipated results, that those results impose undue hardship on Petitioners, or that a decision to grant the requested waivers does not conflict with Commission rules.[23]

10. Bell Atlantic responds that its petition satisfies the Commission's "good cause" standard because the Commission has previously found "good cause" to grant Ameritech and SWB similar waivers to offer operator services that foster competition among IXCs and expand consumer choices by enabling IXCs to offer such consumers additional services.[24] Thus, Bell Atlantic, claims there is "good cause" for it to receive a similar waiver because its proposed operator services would similarly increase consumer choice and foster competition among IXCs for operator services.[25]

11. SWB argues that it would be more consistent with Commission's rules for it to recover the costs of these operator services through new access rate elements because there are no existing rate elements for these services.[26] SWB adds that denial of its requested waiver would subject SWB to undue hardship because SWB would then have no choice but to recover the costs of these services from general ratepayers through basic access rates. SWB also contends that such recovery would not be appropriate given the competitive nature of these services.[27]

12. In its reply to comments on the SWB Petition, Bell Atlantic submits that the SWB waiver petition should be granted because the Commission previously waived Part 69 for similar services offered by SWB. Bell Atlantic contends that in the *Southwestern Order*, the Commission granted a waiver because: 1) the proposed operator services did not relate to any existing interexchange services that SWB provided; and 2) the Commission found that recovering the costs of the operator services through a new access rate

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[13] MCI Comments (Bell Atlantic Petition) at 2.
[14] SWB Reply (SWB Petition) at 4-5.
[15] Bell Atlantic Reply (Bell Atlantic Petition) at 1-2.
[16] *Id.* at 4-6.
[17] SWB Reply (SWB Petition) at 5.
[18] *Id.* at 5-6.
[19] Sprint Comments (Bell Atlantic Petition) at 3; Sprint Comments (SWB Petition), Attachment at 3. *See* Southwestern Bell Telephone Companies, 5 FCC Rcd 3452 (Com. Car. Bur. 1990) (*Southwestern Order*).
[20] Sprint Comments (Bell Atlantic Petition) at 2-3; Sprint Comments (SWB Petition), Attachment at 2-3.
[21] Bell Atlantic Reply (Bell Atlantic Petition) at 4-5; SWB Reply (SWB Petition) at 6-7.
[22] MCI Comments (Bell Atlantic Petition) at 1-2; Sprint Comments (Bell Atlantic Petition) at 2-3; MCI Comments (SWB Petition) at 5; Sprint Comments (SWB Petition), Attachment at 2-3.
[23] Sprint Comments (Bell Atlantic Petition) at 3. Sprint Comments (SWB Petition), Attachment at 3.
[24] Bell Atlantic Reply (Bell Atlantic Petition) at 2-4, *citing Southwestern Order* and Ameritech Operating Companies, 6 FCC Rcd 1541 (Com. Car. Bur. 1991).
[25] Bell Atlantic Reply (Bell Atlantic Petition) at 2-3.
[26] SWB Reply (SWB Petition) at 3.
[27] *Id.* at 2.

element would be more consistent with its access charge policy than recovering such costs through any of SWB's existing interexchange category services.[28]

13. BellSouth and Southwestern urge the Commission not only to approve Bell Atlantic's waiver request, but also to grant a waiver of general application that would accommodate alternate rate structures established by other LECs for interLATA operator services.[29] While Bell Atlantic supports SWB's petition for waiver, Bell Atlantic questions the scope of that petition.[30]

III. DISCUSSION

14. Commission rules may be waived when "good cause" is shown.[31] The Commission may exercise its discretion to waive a rule where the particular facts would make strict compliance inconsistent with the public interest.[32] In addition, the U.S. Court of Appeals has stated that the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individualized basis.[33] Waiver is thus appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule.[34]

15. To assist in determining whether the requested waivers better serve the public interest, we consider some of the goals of the access proceeding that led to establishment of the access charge rate elements.[35] Two of the goals in that proceeding were to establish a competitive interstate services market structure and to adopt a set of access rules that would cover all access facilities and services.[36] In order to further the goals of that proceeding, the Commission prescribed in Part 69 a set of rate elements for the access services that LECs -- such as the Bell Operating Companies (BOCs) -- would be likely to provide at the time of divestiture. Part 69 initially included an "Operator Assistance Element" for the "direct assistance" of the LEC operator in completing interexchange calls. Because the Commission did not expect that the BOCs would be providing such operator call processing services after divestiture, however, the Commission eliminated that element in 1983.[37] Over a decade later, the provision of operator assistance services appears to be changing. Companies such as Bell Atlantic and SWB now seek to resume providing such operator services although Part 69 no longer includes access charge rate elements for these services.

16. We conclude that the proposed offerings of Bell Atlantic and SWB will bring IXCs and their customers a greater choice of interstate operator services. Such increased choices generally foster competition. In addition, because existing access rate elements do not cover these proposed services, grant of the requested waivers will enable Bell Atlantic and SWB to establish new rate elements for these services that are tailored precisely to their respective services, rather than attempting to force their services into existing rate elements. Creation of new rate elements will, also, advance the goals of the Commission's access charge regime by enabling these carriers to better match relevant costs and rate elements and, in that way, to better recover the costs of these operator services from those customers who use them. Given these two important benefits -- fostering competition and advancing the access charge scheme -- we conclude that grant of these waivers will better serve the public interest than strict adherence to the current general rule, except as indicated in paragraph 19 below.

17. With regard to MCI's contention that the waiver violates the MFJ, any claim regarding violation of the MFJ is appropriately raised with the District Court, not with the Commission. We also reject MCI's suggestion that the Commission defer a decision on Bell Atlantic's waiver request pending clarification of certain MFJ issues. Any such delay would unnecessarily defer realization of the public interest benefits we have outlined above.

18. In contrast with the current proceeding, in the *Southwestern Order*, the Bureau considered the simultaneous filing of both a Section 69.4(b) waiver request and a related tariff transmittal implementing the requested rate elements.[38] Consequently, it was necessary for the Bureau to resolve cost as well as structure issues in that proceeding. In the case before us, however, neither Bell Atlantic nor SWB has yet filed a tariff transmittal to implement its proposed rate elements. Thus, it is premature to address at this time the cost issues raised by Sprint. Similarly, concerns about price cap treatment and anticompetitive conduct, such as those raised by MCI, are best addressed when the relevant tariffs and required justifications are filed.

19. Finally, SWB seeks a waiver of Part 69 in part to establish new access rate elements for call recording and call rating.[39] As Bell Atlantic notes, however, the Commission detariffed call rating services in the *Billing and Collection Order*.[40] In that same order, the Commission also

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[28] Bell Atlantic Reply (SWB Petition) at 2.

[29] BellSouth Comments at 1-3; Southwestern Reply (Bell Atlantic Petition) at 4.

[30] Bell Atlantic Reply (SWB Petition) at 1-3. In particular, Bell Atlantic questions SWB's need for a waiver of Section 69.4(b) to establish a call rating service in light of the Commission's decision to detariff call rating functions in the earlier billing and collection proceeding. *See* SWB Petition at 2-4 and Bell Atlantic Reply (SWB Petition) at 4-5. *See also* Detariffing of Billing and Collection Services. CC Docket No. 85-88, 102 FCC 2d 1150, 1151 n.2 (*Billing and Collection Order*), *recon. denied*, 1 FCC Rcd 445 (1986).

[31] *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.

[32] *See* Petition for Waiver of the Commission's Rules to Recover Network Depreciation Costs, 9 FCC Rcd 377, 388 (para. 30) (1993), *citing* Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990) (*Northeast Cellular*).

[33] WAIT Radio v. FCC, 418 F.2d. 1153, 1158 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

[34] *Northeast Cellular*, 897 F.2d at 1166.

[35] *See, e.g.*, MTS and WATS Market Structure, Third Report and Order, CC Docket No. 78-72, Phase I, 93 FCC 2d 241, 308-309 (para. 229) (1983) (*Access Charge Decision*), *mod'd on recon*, 97 FCC 2d 682 (1983), *mod'd on further recon.*, 97 FCC 2d 834 (1984), *aff'd in principal part and remanded in part*, National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985), *mod'd on further recon.*, 99 FCC 2d (1984), 101 FCC 2d 1222 (1985), *aff'd on further recon.*, 102 FCC 2d 849 (1985).

[36] *See* MTS and WATS Market Structure, CC Docket No. 78-72, 67 F.C.C. 2d. 757 (1978) and *Access Charge Decision*, 93 FCC 2d. at 245-247 (paras. 9-15) (1983).

[37] *See Access Charge Decision*, 97 FCC 2d at 738 (para. 136).

[38] *See Southwestern Order*, 5 FCC Rcd at 3453.

[39] SWB Application at 4.

[40] Bell Atlantic Reply (SWB Petition) at 4-6.

detariffed call recording services and required LECs to withdraw existing tariffs for both these services.[41] Thus, to offer call recording or rating, it is no longer necessary for SWB or other LECs to secure a waiver of Part 69. Accordingly, we dismiss as moot SWB's waiver petition with regard to these two rate elements.

20. For the reasons discussed above, we find good cause to grant the petition of Bell Atlantic for a waiver of Part 69 and to grant in part and dismiss in part SWB's similar petition.

IV. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, the above petition for waiver filed by the Bell Atlantic Telephone Companies IS GRANTED.

22. IT IS FURTHER ORDERED, that the above petition for waiver filed by Southwestern Bell Telephone Company IS GRANTED IN PART and DISMISSED IN PART.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief, Common Carrier Bureau

[41] *Billing and Collection Order*, 102 FCC 2d at 1151 n.2, 1173-1175 (paras. 45-47).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 9, 1994

SOUTHERN NEW ENGLAND TELEPHONE COMPANY REQUEST FOR INJUNCTIVE RELIEF REGARDING TELEPHONE NUMBERS IN 800-555 SERIES
IAD File No. 94-103

COMMENTS: January 17, 1995
REPLY COMMENTS: February 1, 1995

On November 23, 1994, The Southern New England Telephone Company (SNET) filed a request for interim relief in the form of a preliminary injunction and stay ordering the Bell Operating Companies and Database Service Management, Inc. (DSMI), a wholly-owned subsidiary of Bell Communications Research, Inc., to cease and desist from issuing seventeen (17) telephone numbers in the 800-555 series until this Commission has examined the procedures used to issue those numbers. SNET also requests that this Commission direct the administrator of the North American Numbering Plan to comply with industry guidelines for 800 number administration and that the designated 800-555 numbers be assigned in the order in which requests for them were received.

On December 8, 1994, following receipt of the SNET request, the Chief of the Industry Analysis Division in the Commission's Common Carrier Bureau requested DSMI to refrain from issuing these seventeen numbers until the Commission has an opportunity to consider the matters raised by SNET.

Interested parties may file comments on the SNET request not later than **January 17, 1995**. Reply comments should be filed not later than **February 1, 1995**. All comments should include the above Industry Analysis Division (IAD) File Number.

An original and four copies of all comments and replies should be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each comment should be filed with International Transcription Service, the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. In addition two copies should be filed with the Chief, Industry Analysis Division, Common Carrier Bureau, Room 10, Plaza Level, 1250 23rd Street, N.W., Washington, D.C. 20554.

For further information, contact Larry Povich, Industry Analysis Division, Common Carrier Bureau (202) 418-0940.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Ameritech Operating Companies,
Bell Atlantic Telephone Companies,
BellSouth Telecommunications, Inc.,
Cincinnati Bell Telephone Company,
GTE Services Corporation, The NYNEX
Telephone Companies, Pacific Bell,
Rochester Telephone Corp., Southern
New England Telephone Company,
Southwestern Bell Telephone Company,
The United Telephone and Central
Telephone Companies, and
U S West Communications

Petitions for Waiver of Sections
69.4(b) and 69.106 of Part 69 of the
Commission's Rules

ORDER

Adopted: November 30, 1994; Released: November 30, 1994

By the Chief, Common Carrier Bureau:

I. SUMMARY

1. Twelve local exchange carriers ("LECs") have filed petitions for waiver of the Commission's Part 69 Rules[1] to establish separate rate elements for the provision of 500 access service. In this Order, we grant these petitions.

II. BACKGROUND

2. 500 service is a new "follow me" personal communications service that offers consumers a variety of features. A 500 service customer, among other things, can instruct his 500-service provider where to route his calls (whether to landline or cellular telephones, pagers, or to a voice message service). The customer can also instruct his 500 service provider to screen his calls so that only authorized callers can reach him.[2] 500 service is expected to generate significant benefits in terms of improved productivity and increased convenience for both business and residential users.

3. In order to provide such ubiquitous "follow-me" service to their subscribers, 500 service providers – which may include a number of interexchange carriers ("IXCs"), cellular companies, enhanced service providers ("ESPs"), Personal Communications Services ("PCS") providers, and possibly even LECs – will use LEC access service. In providing 500 access service, the LECs must screen the first six digits of the ten digit 500 number (*i.e.*, 500-NXX) in order to identify and route calls to the subscriber's designated 500 service provider.[3] The 500 service provider, using database technology, will then route the call to the phone or other device designated by the 500 service subscriber.

4. There are two ways that a LEC can perform this six-digit screening and routing. First, the LEC can use switch-based translation, in which case it employs a translation table contained in the software of the LEC switches, located at either the end office or access tandem, to route the call to the subscriber's 500 service provider. Alternatively, if a LEC's end office or access tandem has Advanced Intelligent Network (AIN) capability, the LEC makes a signalling query to a centralized AIN database to identify the 500 service provider and routing.[4]

5. The Ameritech Operating Companies ("Ameritech") petitioned the Commission for a waiver of Section 69.106 of the Commission's Rules to establish new nonrecurring rate elements within the Local Switching access category for recovering costs associated with the provision of 500 access service in July 1994. Subsequently, over a two-month period, we received petitions for waiver of Sections 69.4 and 69.106 of the Commission's Rules[5] to establish new rate elements for the recovery of 500 access service costs from eleven additional carriers: the Bell Atlantic Telephone Companies ("Bell Atlantic"), BellSouth Telecommunications, Inc. ("BellSouth"), Cincinnati Bell Telephone Company ("CBT"), GTE Service Corporation ("GTE"), the NYNEX Telephone Companies ("NYNEX"), Pacific Bell (PacBell), Rochester Telephone Corporation ("Rochester"), the Southern New England Telephone Company ("SNET"), Southwestern Bell Telephone Company ("SWBT"), the United Telephone and Central Telephone Companies ("United"), and U S West Communications ("U S West").

6. The Common Carrier Bureau ("Bureau") released five public notices establishing pleading cycles on the petitions. Six LECs, five interexchange carriers ("IXCs"), the Missouri Public Service Commission ("Missouri PSC"), the Ad Hoc Telecommunications Users Committee ("Ad Hoc"), and Nextel Communications, Inc. ("Nextel"), a specialized mobile radio ("SMR") carrier, filed comments, oppositions or "petitions to reject" in response to the five public

[1] 47 C.F.R. § 69.1 *et seq.*
[2] *See* AccessLine Reply Comments at 1.
[3] Bell Atlantic Petition at 1-2.
[4] If six-digit screening is performed at the tandem switch, end office switches will have to be programmed to recognize the 500 calls and route them to the tandem.
[5] Section 69.4, entitled "Charges to be filed," lists the various rate elements that a LEC must file with the Commission.

notices.[6] Ten LECs, three IXCs, prospective 500-service provider AccessLine Technologies, Inc. ("AccessLine"), and Nextel filed reply comments.[7]

III. POSITIONS OF THE PARTIES

7. In their petitions for waiver, the LECs state that they will incur costs in providing 500 access service and that these costs cannot be recovered under existing Part 69 rate elements. They seek waivers to permit recovery of those costs through new charges to be paid by 500-service providers.[8] The petitions propose rate structures for 500 access service that differ in terms of both the number and kind of charges. LECs planning to employ exclusively switch-based translation to route 500 calls propose to charge one or more nonrecurring rate elements and no recurring rate element.[9] LECs planning to employ exclusively an AIN database to route 500 calls propose to charge a recurringp per-call charge.[10] GTE, which plans to employ switch-based translation initially, requests that, if and when it shifts to AIN, it be permitted to charge a recurring charge and a nonrecurring charge (in case it needs to make customer-requested changes to its AIN database).[11] NYNEX and SWBT will initially use switch-based translation and then shift to an AIN-based system. NYNEX, which plans to shift almost entirely to an AIN-based system by March 1, 1995, proposes to charge a recurring charge once the AIN system is implemented and has proposed to offer limited 500 access service as a non-chargeable item until then.[12] SWBT, which plans to shift to an AIN-based system in the second or third quarter of 1995, proposes to use a recurring per-call charge from the start.[13] Finally, BellSouth and U S West, which plan to employ hybrid systems in which some end offices use AIN technology and others switch-based technology, propose both a recurring per-call rate element and one or more nonrecurring elements.[14]

8. MCI, Sprint, Allnet, LDDS, Ad Hoc, and Nextel oppose grant of the waivers.[15] These commenters make a number of specific arguments concerning whether the individual LEC waiver requests should be granted, whether a blanket 500 access-service waiver should be granted, and whether various conditions, such as the use of a uniform rate structure, should be placed on the waivers. These arguments and the LEC responses are summarized below.

A. The Need for and Merits of Specific Waiver Requests

9. Commenters opposing the waivers allege that the petitioners have not met the standards for grant of a waiver. Allnet contends that the petitions are defective because they fail to show why the current access rates are not adequate to recover the cost of providing 500 access service.[16] Ad Hoc contends that the LECs should not be allowed to pass on the costs of implementing 500 access service. Rather, it claims that all LECs, carriers, and users should bear their own costs resulting from the new 500 Service Access Code ("SAC") as well as the costs of other numbering plan changes.[17] MCI and Allnet suggest that the existing rate structure for 800 database could be applied to 500 access.[18] Alternatively, MCI suggests that 500 access service can be provided using existing 900 access rate structures.[19] Asserting that the same screening procedure will be used for both 900 access service and 500 access service, LDDS also argues that the nonrecurring charges for 500 service should be the same as those for 900 service.[20] In an *ex parte* letter dated November 28, 1994, MCI argues that the Commission should deny the waiver petitions and require all LECs to adopt AIN technology to provide 500 access service. MCI asserts that requiring the use of AIN technology would reduce costs, permit a uniform rate structure, and facilitate 500 number portability.[21]

10. LDDS and Ad Hoc claim that the LECs have failed to satisfyp the good cause standard for grant of a waiver because the petitioners failed to cost-justify their proposed

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Section 69.106, entitled "Local Switching," describes the requirements for the Local Switching rate element for switched access service.

[6] The parties filing comments in response to the five public notices are listed in Appendix A. Citations to the comments and reply comments generally identify both the name of the commenter and the public notice to which the comment was directed. When a filing is directed to more than one public notice, we only identify the filing party.

[7] *See* Appendix A.

[8] *See, e.g.*, Ameritech Petition at 2; BellSouth Petition at 3; NYNEX Petition at 2.

[9] Among the LECs requesting only nonrecurring rate elements, Ameritech asks for five, United four, CBT three, and Rochester one. Ameritech Petition at 2; United Petition at 3; CBT Petition at 2; Rochester Petition at 3. GTE's petition does not specify the number of nonrecurring rate elements it proposes to charge for switch-based translation. GTE Petition at 2-3.

[10] *See, e.g.*, Bell Atlantic Petition at 2. Although SNET in its waiver petition proposed to charge both a recurring per-call charge and a nonrecurring charge, it subsequently decided not to propose a nonrecurring charge because the customer-specific, nonrecurring costs that this charge was intended to recover would likely be *de minimis*. *See* SNET Petition at 2; *Ex Parte* Letter to William F. Caton, Secretary, FCC from Wendy S. Bluemling (November 3, 1994).

[11] *See Ex Parte* Letter to William F. Caton, Secretary, FCC from Gail L. Polivy, Attorney for GTE (November 3, 1994). *See also* GTE Petition at 3.

[12] NYNEX Petition at 2. NYNEX also filed a tariff transmittal reflecting this approach. NYNEX FCC Tariff No. 1, Transmittal No. 329 (September 8, 1994).

[13] SWBT Petition at 3. *Ex Parte* Letter to William F. Caton, Secretary, FCC from Sandra L. Wagner, Director, Federal Regulatory, Southwestern Bell Corporation (November 4, 1994).

[14] U S West seeks one recurring charge and two nonrecurring charges, while BellSouth seeks one recurring charge and one or more nonrecurring charges. U S West Petition at 5-6; BellSouth Petition at 3.

[15] MCI Petition to Reject (First Public Notice) at 1-2; Sprint Comments 2-3; Allnet Opposition (First Public Notice) at 1-2; LDDS Comments at 2-3; Ad Hoc Comments (Third Public Notice) at 1-4; Nextel Reply Comments at 1-2.

[16] Allnet Opposition (First Public Notice) at 1-2.

[17] Ad Hoc Comments (Third Public Notice) at 5-6.

[18] MCI Petition (Second Public Notice) at 3-4; Allnet Opposition (First Public Notice) at 1.

[19] MCI Petition (Second Public Notice) at 4. In a subsequent filing, MCI suggests that the Commission require the LECs to provide 500 access service using an SS7 database and a tariff structure similar to that for 800 database service. Alternatively, MCI argues that, if the Commission allows the LECs to employ switch-based translation, then it should require the LECs to tariff 500 access the same as 900 access. MCI Opposition (Fourth Public Notice) at 1-2.

[20] LDDS Comments at 4.

[21] *Ex Parte* letter to Kathleen Wallman, Chief, Common Carrier Bureau, from Donald F. Evans, Director, Federal Regulatory Affairs, MCI (November 28, 1994).

rate structures or tariffs or to justify the disparities in the proposed rate structures and levels.[22] MCI argues that the petitioners have failed to meet the waiver standard because there is no public interest benefit in allowing the LECs to impose multiple and varying rate structures.[23]

11. Ad Hoc suggests that the issue of 500 access service should be addressed in a rulemaking proceeding and not through waivers, because the issue affects all LECs and, accordingly, individual LECs cannot demonstrate the requisite "unique or extraordinary circumstances."[24] AccessLine, while supporting the idea of interim waivers, also calls on the Commission to initiate a comprehensive rulemaking proceeding.[25]

12. Responding to these arguments, Ameritech, GTE, and SWBT argue that new rate elements are necessary to recover the costs for the new 500 access service.[26] The LECs dispute the contention that existing rate elements can be used to recover the costs of 500 access service. Rebutting Allnet's and MCI's argument that 800 access charges should be applied to 500 access service, several LECs argue that: (1) a number of LECs will not be using an 800-type database;[27] and (2) the 800 rate structure is limited under the Commission's orders to use for 800 access service.[28] Countering the suggestion that 900 access rates can be used for 500 access service, Ameritech asserts that the customer type, service definitions, and future enhancements of the two services differ, and that attempts to recover 500 costs through the 900 rate elements would violate the terms of the 900 access service waivers.[29] Bell Atlantic states that the nonrecurring-charge rate structure for 900 service is based on the one-time switch translation necessary for that service, and that this is inconsistent with the AIN technology it plans to use for 500 access service.[30] The LECs also reject Allnet's contention that the existing rate structure for general access services is adequate to recover the costs of 500 access service, and argue that it would be inappropriate to recover these costs from customers other than cost causers.[31]

13. The LECs argue that multiple rate structures are in the public interest, because the LECs will use different technologies and architectures to provide the service.[32] Finally, with respect to the argument that the LECs have failed to cost justify their proposed rate structures, the LECs respond that cost justification should occur at the tariff review stage.[33]

B. Blanket Waiver

14. All the LECs and AT&T support U S West's proposal that the Commission grant a "blanket Part 69 waiver enabling any 500 access service provider to propose any rate element (recurring and/or non-recurring), with providers defending their proposed rate structure in the tariff process."[34] U S West contends that a blanket waiver would conserve resources both of the Commission and of the carriers and would facilitate the early introduction of this new service.[35] BellSouth supports the blanket waiver because the LECs are planning to provide 500 access service in different ways, and it argues that they should be permitted to establish rate structures that reflect their particular service offerings.[36] Ameritech claims that a blanket waiver is in the public interest, because it would eliminate the additional time and expense required for it to file, and the Commission to grant, another Part 69 waiver when and if it shifts to AIN.[37] Bell Atlantic recommends that the blanket waiver be worded sufficiently broadly to encompass future routing services, or, at a minimum, to cover a variety of network and rate configurations.[38] AT&T, while supporting a blanket waiver, asks the Commission to grant the waivers as filed on an "interim basis" and address the issues raised by 500 access service through an investigation and accounting order.[39]

15. MCI and Sprint oppose the grant of a blanket waiver. They argue that it would give the LECs too much flexibility in setting rate structures and undermine rate structure uniformity.[40] Responding to AT&T's proposal, BellSouth and U S West oppose the idea of granting only "interim" waivers.[41]

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[22] LDDS Comments at 2-3; Ad Hoc Opposition (Third Public Notice) at 4; Ad Hoc Opposition (Fifth Public Notice) at 2 & 4.

[23] *See, e.g.*, MCI Petition (First Public Notice) at 3-4; MCI Petition (Third Public Notice) at 2-3.

[24] Ad Hoc Opposition (Third Public Notice) at 2-3; Ad Hoc Opposition (Fifth Public Notice) at 2-4.

[25] Accessline Reply Comments at 2-4.

[26] Ameritech Reply Comments (First Public Notice) at 1; GTE Reply Comments (First Public Notice) at 2; SWBT Reply Comments at 1.

[27] Ameritech Reply Comments (First Public Notice) at 3 n.4.

[28] Bell Atlantic Reply Comments (First Public Notice) at 4 n.11; BellSouth Reply Comments (First Public Notice) at 2. In addition, U S West states that the 800 database itself is technologically limited to querying 800 numbers and cannot be programmed to perform database queries concerning other SAC codes. U S West Reply Comments (First Public Notice) at 7.

[29] Ameritech Reply Comments (First Public Notice) at 1-2. *See also* U S West Reply Comments (First Public Notice) at 6.

[30] Bell Atlantic Reply Comments (First Public Notice) at 3.

[31] SWBT Reply Comments at 1; NYNEX Reply Comments (Third Public Notice) at 3-4. *See also* Ameritech Reply Comments (First Public Notice) at 1; GTE Reply Comments (First Public Notice) at 2.

[32] *See infra* para. 20.

[33] *See, e.g.*, Bell Atlantic Reply Comments (First Public Notice) at 4; BellSouth Reply Comments (First Public Notice) at 6; NYNEX Reply Comments (Third Public Notice) at 2; SWBT Reply Comments at 5.

[34] U S West Comments (First Public Notice) at 1. *See also* Ameritech Comments (First Public Notice) at 1; AT&T Comments (Fifth Public Notice) at 2; Bell Atlantic Comments (First Public Notice) at 2; GTE Comments (First Public Notice) at 4-5; Rochester Comments (First Public Notice) at 1; SNET Comments (First Public Notice) at 2; SWBT Comments at 2.

[35] U S West Comments (First Public Notice) at 5.

[36] BellSouth Reply Comments (First Public Notice) at 2-3.

[37] Ameritech Reply Comments (First Public Notice) at 3.

[38] Bell Atlantic Comments (First Public Notice) at 2. U S West echoes Bell Atlantic's comments concerning the need for a broad waiver in its reply comments. U S West Reply Comments (First Public Notice) at 9-10.

[39] AT&T Comments (First Public Notice) at 2-4.

[40] MCI Reply Comments (Third Public Notice) at 3; Sprint Comments at 5-6.

[41] BellSouth Reply Comments (First Public Notice) at 3 n.5; U S West Reply Comments (First Public Notice) at 1 n.3.

C. Conditions on the Waivers

16. A number of parties present arguments favoring the imposition of conditions if the Bureau decides to grant waivers. MCI, Sprint, LDDS, and Nextel ask the Bureau to mandate a uniform rate structure. MCI argues that this would prevent discrimination against smaller carriers.[42] Sprint contends that a non-uniform rate structure would make it difficult for carrier-customers to review, verify, and audit charges from different LECs and that this burden would fall disproportionately on smaller IXCs.[43] LDDS asserts that the Commission must adopt guidelines to ensure that 500 access charges are consistent and reasonable.[44] Nextel also argues that a uniform rate structure will simplify the process of obtaining 500 access and facilitate the evaluation of the reasonableness of the rates proposed in 500 access tariffs.[45]

17. LDDS and Sprint question the appropriateness of permitting a recurring charge for 500 access service. LDDS claims that the LECs have not shown that there are unique recurring costs associated with the provision of 500 access services,[46] while Sprint opposes recurring rate elements to the extent 500 access costs are presently recovered through the local switching charge.[47] MCI and Sprint concede, however, that a recurring charge, similar to that proposed by Bell Atlantic, may be appropriate where the LEC invests in AIN, rather than simply using switch-based translation technology.[48]

18. Nextel argues that the Commission should require an unbundled cost-based tariff structure and suggests that the Commission monitor the terms and conditions of the LECs' 500 access services so as to prevent unreasonable or discriminatory pricing.[49] Finally, Sprint asks the Commission to prohibit any volume discounts associated with recurring 500 access-service rate elements.[50]

19. MCI asserts that there are six "core capabilities that a uniform LEC 500 access service tariff should offer." MCI argues that these core capabilities are necessary to ensure that 500 service providers have sufficient operating flexibility, and that they should be provided on a nondiscriminatory basis.[51]

20. Several LECs object to any mandatory, uniform rate structure for 500 access service. They assert that those supporting a uniform rate structure fail to recognize that the LECs will use a variety of technologies and architectures to provide 500 access service and that mandating uniform rate elements would guarantee that some LECs have a rate structure unrelated to the way costs are incurred.[52] Bell Atlantic further argues that any attempt to dictate a single rate structure will only slow the deployment of the service.[53] Rochester contends that a uniform rate structure will inhibit LECs from offering customized solutions to meet their customers needs.[54] BellSouth notes that the Commission previously approved the use of more than one rate structure for interim 800 access service and for 900 access service.[55]

21. Responding to LDDS and Sprint, several LECs support the use of recurring charges. Bell Atlantic, for example, explains that its 500 access service will be provided through database technology, independent of the traditional switching function, and that this technology requires additional investment. It adds that a recurring charge is more appropriate than a nonrecurring charge, given the nature of the costs involved.[56] Similarly, BellSouth explains that a recurring per-call charge reflects utilization of database queries to identify the access customer to whom a 500 call should be routed.[57]

D. Miscellaneous

22. AccessLine expresses concern about the "assumption" that all 500 service providers will be treated as IXCs and required to take access "under some variant of the current access regime."[58] It argues that the imposition of access charges would make 500 service too expensive for many consumers. Similarly, Nextel argues that 500 service providers should not be required to purchase interexchange access services, but should be permitted to purchase interconnection services on the same terms and conditions as other co-carriers.[59]

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[42] *See, e.g.,* MCI Petition (First Public Notice) at 7; MCI Opposition (Fourth Public Notice) at 5. MCI adds that, to the extent a recurring charge is required, it would facilitate the transition to number portability. MCI Petition (First Public Notice) at 8.

[43] Sprint Comments at 5. Similarly, MCI argues that a uniform tariff would minimize the IXCs' cost of tracking access usage and would ensure that LECs do not discriminate against an IXC or group of IXCs. MCI Petition (First Public Notice) at 6.

[44] LDDS Comments at 4.

[45] Nextel Reply at 2-3.

[46] LDDS Comments at 4.

[47] Sprint Comments at 2-3; Sprint Comments (Fifth Public Notice) at 2.

[48] MCI Petition (First Public Notice) at 5; Sprint Comments at 3-4 (Sprint adds that the Commission should require such LECs to demonstrate that the investment is new and distinct from that recovered through existing rate elements). *See also* Sprint Comments (Fifth Public Notice) at 3 (same).

[49] Nextel Reply Comments at 2 & 4.

[50] Sprint Comments at 4.

[51] MCI Petition (First Public Notice) at 6-7. Those "core capabilities" are: (1) subscribers should be able to dial directly the 500 service provider of their choice, regardless of the type of telephone used (*e.g.,* residential, wireless, or payphone); (2) 0+500 calls should be routed directly to the 500 service provider and not to the LEC operator; (3) LECs should provide information on the number to be charged and any associated information digits on all calls; (4) using the SS7 interface, LECs should provide the calling party number and any associated privacy indicator; (5) translation and routing should be Signal Control Point (SCP) based to allow customers to change 500 service providers easily; and (6) initial connectivity should be provided via Feature Group D access.

[52] *See* Bell Atlantic Reply Comments (First Public Notice) at 2; BellSouth Reply Comments (First Public Notice) at 2-3; GTE Reply Comments (First Public Notice) at 2-3; SWBT Reply Comments at 4; U S West Reply Comments (First Public Notice) at 7-8. *See also* U S West Comments (First Public Notice) at 3-4 (an added reason to avoid uniformity is that LECs employing AIN may want to introduce optional features which will require separate rate elements).

[53] Bell Atlantic Comments (First Public Notice) at 2.

[54] Rochester Reply Comments (Fourth Public Notice) at 2.

[55] BellSouth Reply Comments (First Public Notice) at 3-4.

[56] Bell Atlantic Reply Comments (First Public Notice) at 2-3.

[57] BellSouth Reply Comments (First Public Notice) at 4-5.

[58] AccessLine Reply Comments at 3.

[59] Nextel Reply Comments at 4.

23. Certain parties argue that the Bureau should address additional issues. AccessLine suggests that we address the question of whether charges for 500 calls should be billed to the originating party, the called party, or the 500 service provider.[60] Sprint requests that the Commission open an investigation to consider 500 number portability,[61] to which U S West responds that such an investigation is premature and unnecessary.[62] Ad Hoc argues that the issue of whether new rate elements are needed must be coordinated with the Commission's North American Numbering Plan proceeding and with the anticipated overall revisions to the access charge rules.[63]

24. Finally, the Missouri PSC asks the Commission to condition any waivers on a requirement that the LECs file the new tariffs concurrently at the state and federal levels.[64] Bell Atlantic responds that this request is outside the Commission's jurisdiction.[65] Similarly, BellSouth responds that the authority to order state tariffs to be filed lies with state regulatory authorities.[66] Both add that they plan to file state tariffs as soon as interstate tariff issues have been resolved.[67]

III. DISCUSSION

25. In order to qualify for a waiver, parties must demonstrate that the application of generally applicable rules would not be in the public interest in the particular circumstances under consideration.[68] We find that the petitioning LECs have demonstrated that special circumstances exist that warrant the granting of relief, that such relief will serve the public interest, and that granting the waivers will not undermine the Part 69 rules. More specifically, based on the record, we find that the LECs will incur costs in providing this new service and that the existing Part 69 rate elements are not designed to recover these costs from the customers using 500 access service. Moreover, this service was not anticipated when the Part 69 Rules were adopted.[69] We further find that grant of the waivers will benefit consumers by expediting the availability of a new service. We also note that grant of the waivers is consistent with past Bureau actions taken when interim 800 access service and 900 access service were first introduced.[70] Accordingly, weFfind the LECs should be allowed to implement new rate elements to recover the costs of providing 500 access service from the access customers using this service. We reject MCI's suggestion that, at this time, we require all LECs to employ AIN technology in providing 500 access service, because it would unnecessarily delay the introduction of a new service that offers significant potential benefits to consumers. Because we find grant of the waivers appropriate given the special circumstances, and because we find that expediting the availability of 500 service will serve the public interest, we also reject Ad Hoc's contention that a rulemaking proceeding is required at this time to consider the creation of new rate elements for 500 access service. We note, however, that the Commission will reevaluate the need for a rulemaking proceeding to consider 500 access service rate structure issues in conjunction with 500 number portability policy in the future.

26. Contrary to the claims of certain IXC commenters, we find that the LECs should not use existing rate elements, and in particular existing rate elements for 800 or 900 access service, to recover the costs of 500 access service. Both the Commission orders establishing a per-query rate element for 800 database and the waiver orders establishing rate elements for 900 access service were narrowly drafted to limit the use of those elements to 800 access service and 900 access service respectively.[71] Even if the 800 database order or 900 waiver orders were sufficiently broad to encompass 500 access service, however, it would be inappropriate to impose either of those rate structures on all the LECs, because, for at least some of the LECs, these rate elements would not reflect the way they incurred costs. For example, requiring LECs using switch-based translation to impose a recurring charge does not accurately reflect the way they incur costs for 500 access service. We also reject Ad Hoc's argument that the LECs should be forced to bear the cost of providing 500 access service. 500 access is a new service under price-cap regulation, and the LECs are entitled to recover their costs of providing such services through their tariffs.[72]

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[60] AccessLine Reply Comments at 3.

[61] Sprint Comments at 6.

[62] U S West Reply Comments (First Public Notice) at 9.

[63] Ad Hoc Opposition (Third Public Notice) at 4.

[64] Missouri PSC Comments (First Public Notice) at 1-2.

[65] Bell Atlantic Reply Comments (First Public Notice) at 4 n.12.

[66] BellSouth Reply Comments (First Public Notice) at 8 n.19.

[67] Bell Atlantic Reply Comments (First Public Notice) at 4 n.12; BellSouth Reply Comments (First Public Notice) at 8 n.19.

[68] *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); 47 C.F.R. § 1.3.

[69] *Cf. WAIT Radio v. F.C.C.*, 418 F.2d at 1157 ("a general rule, deemed valid because its overall objectives are in the public interest, may not be in the public interest' if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.")

[70] For interim 800 access service, *see, e.g.*, Ameritech Operating Companies' petition for Waiver fo part 69, *et al.*, Memorandum and Order (1986)(WL, FCOM-FCC database); Interim 800 Exchange Tariffs, Bell Atlantic Operating Companies petition for Wiaver of Part 69, Memorandum Opinion and Order Designating Issues (1986) (WL, FCOM-FCC database); Pacific Bell, Revisions to Tariff F.C.C. No. 128, Order, 1 FCC Rcd 316 (1986); Continental Telephone Companies, Revisions to Tariff F.C.C. No. 1, 2 FCC Rcd 409 (1986). For examples of waiver orders for 900 access service, *see, e.g.*, Lincoln Telephone and Telegraph Company Petition for Waiver of Part 69, Memorandum Opinion and Order, 4 FCC Rcd 5024 (1989); Southern New England Telephone Company Petition for Waiver Concerning 900 Access Service, Transmittal No. 451, Order, 4 FCC Rcd 1395 (1989); The Mountain States Telephone and Telegraph Company, *et al.*, Petition for Waiver of Section 69.4(b) and Subparts B and C, Report and Order, 3 FCC Rcd 7232 (1988).

[71] *See, e.g.*, 900 waiver cases cited in n.70 *supra*. For 800 database service, *see* Provision of Access for 800 Service, Report and Order, 4 FCC Rcd 2824, 2832-33 (1989), *recon.*, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421 (1991), Second Report and Order, 8 FCC Rcd 907, 908-09 (1993). In addition, the 800 database itself can not be used for 500 service.

[72] Likewise, LECs subject to rate-of-return regulation can recover the costs of providing a new service through their tariffs. We further note that Ad Hoc's approach would appear to disadvantage the LECs compared with other businesses which, subject to competitive conditions, can pass on the costs of addressing numbering plan changes.

27. Although the LECs propose different rate structures to recover 500 access costs, we believe, based on the current record, that each LEC's proposed rate structure reasonably reflects the way it will incur costs under the service architecture it plans to employ. Imposition of a uniform rate structure at this time on all the LECs would necessarily result in some LECs having rate structures unrelated to the way they incur costs. We are also concerned that the imposition of a uniform rate structure could delay the availability of 500 access service. Accordingly, we reject the argument, raised by some of the commenters, that we should mandate a uniform rate structure. We further conclude that the objections raised to any use of a recurring charge for 500 access service are without merit. To the extent that a LEC employs AIN technology to provide 500 access service, it should be permitted to recover its costs through a recurring per-call charge in a manner similar to the way LECs impose a per-query charge for 800 database.

28. In the case of AIN-based systems, we conclude that it is reasonable for Bell Atlantic, SNET, and GTE to recover their 500 access costs through a recurring charge (and optionally an additional nonrecurring charge to recover the small customer-specific, nonrecurring costs). In implementing AIN-based 500 access service, they will incur primarily common nonrecurring costs (including the costs of modifying end offices to recognize and suspend 500 calls while making a database query to determine the designated 500 service provider, and the cost of modifying the AIN software) and certain recurring costs (including the portion of the AIN capital cost allocated to 500 access service), with only small customer-specific nonrecurring costs.[73] Thus,Ithe recurring charge will recover primarily recurring costs and common nonrecurring costs plus *de minimis* customer-specific nonrecurring costs.[74]

29. We further conclude that it is reasonable for LECs using switch-based translation to recover their costs through one or more nonrecurring charges. These LECs will incur both common and customer-specific nonrecurring costs.[75] The common nonrecurring costs include the cost of modifying end office and tandem switches to recognize and route 500 calls to the 500 translation table and the cost of creating a 500 translation table in each end office or access tandem. The customer-specific costs, which constitute a significantly greater proportion of the total costs compared with AIN systems, include the cost of entering a particular NXX into the translation tables in each switch and testing the NXX routing.[76] We note that, for purposes of theseLwaivers, we find it not unreasonable to recover common nonrecurring costs either through a recurring charge in the case of AIN (where customer-specific costs are negligible) or through one or more nonrecurring charges in the case of switch-based translation (where customer specific costs are quite substantial).

30. BellSouth and U S West, which are employing hybrid systems, will incur costs related to both AIN technology and switch-based systems, and we find that they should be permitted to recover their costs through one or more nonrecurring charges and a recurring charge in the manner they have proposed. Finally, we believe that it is reasonable for SWBT to recover its costs through a recurring charge, because it plans to convert to an AIN-based system by the second or third quarter of 1995.[77] Similarly, we find it reasonable for NYNEX, which plans to shift to AIN technology by March 1, 1995, to recover its costs, for both its AIN-based system and interim switch-based system, through a recurring charge that applies to both types of service.[78]

31. We reject U S West's suggestion that we grant a blanket waiver with no conditions. We find that the benefits of a blanket waiver are, at this time, outweighed by the benefits derived from the Bureau's considering proposed 500 access service rate structures on a case-by-case basis. Nevertheless, in order to expedite the availability of 500 service, we will permit LECs filing waiver petitions that propose 500 access service rate structures like those approved herein to file tariff revisions simultaneously with their petitions. In addition, LECs filing such petitions can expect expedited consideration of their requests for waiver. For this purpose, only rate structures that match one of the

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[73] *See Ex Parte* Letter to William F. Caton, Secretary, FCC from Marian Canaan, Director - FCC Relations, Bell Atlantic Network Services, Inc. (November 4, 1994); *Ex Parte* Letter to William F. Caton, Secretary, FCC from Alan S. Cort, Staff Director, Federal Regulatory Matters, NYNEX (November 14, 1994); *Ex Parte* Letter to William F. Caton, Secretary, FCC from Sandra L. Wagner, Director, Federal Regulatory, Southwestern Bell Corporation (November 4, 1994).

"Common costs" are those costs that are incurred in producing multiple outputs of a firm or that arise from facilities that are commonly used to provide multiple services or to provide services to multiple customers. The cost of an end-office switch and of upgrading software for the AIN database, and general overhead costs are all examples of common costs. "Customer-specific costs," in contrast, are costs incurred in providing service to a specific customer. The costs of processing a customer order and activating a particular telephone number are examples of customer-specific costs. Finally, nonrecurring costs are costs that, once incurred, need not be incurred again; they may be common or customer-specific. Such nonrecurring costs generally arise from the performance of a task or function that needs to be performed only once. *See generally* 1 *Alfred E. Kahn, The Economics of Regulation: Principles and Institutions* 77-79 (1970).

[74] *See, e.g.,* Letter to William F. Caton, Secretary, FCC from Marian Canaan, Director - FCC Relations, Bell Atlantic Network Services, Inc. (November 4, 1994); Letter to William F. Caton, Secretary, FCC from Whit Jordan, Executive Director - Federal Regulatory, BellSouth (November 1, 1994); Letter to William F. Caton, Secretary, FCC from Cyndie Eby, Executive Director - Federal Regulatory, U S West, Inc. (November 4, 1994).

[75] These petitioning LECs are Ameritech, CBT, GTE (initially), PacBell, Rochester, and United.

[76] *See Ex Parte* Letter to William F. Caton, Secretary, FCC from Cronan O Connell, Director, Federal Relations, Ameritech (November 4, 1994); *Ex Parte* Letter to William F. Caton, Secretary, FCC from Alan S. Cart, Staff Director, Federal Regulatory Matters, NYNEX (November 14, 1994); *Ex Parte* Letter to William F. Caton, Secretary, FCC from Whit Jordan, Executive Director - Federal Regulatory, BellSouth (November 1, 1994).

[77] *Ex Parte* Letter to William F. Caton, Secretary, FCC from Sandra L. Wagner, Director, Federal Regulatory, Southwestern Bell Corporation (November 4, 1994).

[78] *Ex Parte* Letter to William F. Caton, Secretary, FCC from Alan S. Cart, Staff Director, Federal Regulatory Matters, NYNEX (November 14, 1994). NYNEX ultimately plans to charge a single recurring per-call charge, but, unlike SWBT, it did not intend to charge separately for 500 access until its AIN-system is implemented.

approved rate structures will be deemed to qualify for expedited review. Because 500 access service is a new offering, we believe this approach properly balances the benefits of expedited review against the benefits of a case-by-case consideration of future waiver petitions. In taking this action, however, we do not intend to suggest that LECs cannotpropose other rate structures that differ from those approved in this Order.

32. We decline to address the issue of the reasonableness of the LECs' rate levels in this order. The proper forum for reviewing the reasonableness of rate levels is the tariff review process in which the LECs will have to justify their proposed rates under the "new services" test. We likewise defer to the tariff review process any questions concerning volume or term discounts that might be proposed by the LECs for 500 access service. Moreover, we decline the requests of Nextel and AccessLine that we address whether enhanced service providers or cellular companies should pay interstate access charges in conjunction with 500 access service, who should be billed for 500 calls, or when or under what conditions we should mandate 500 number portability. Such issues are beyond the scope of this waiver proceeding, and we lack a record adequate to enable us to resolve these issues. Likewise, to the extent MCI is seeking a ruling on the functionalities the LECs must provide as part of 500 access service, we decline to address this issue in the present order because it is beyond the scope of this waiver proceeding and because we lack a record adequate to enable us to resolve this issue.

33. We also decline to grant the request by the Missouri PSC that we condition any waivers on a requirement that the LECs file new tariffs concurrently at the state and federal levels, because the issue of whether there should be state tariff filings for 500 access service is best addressed by the state regulatory bodies.

34. Finally, we reject Ad Hoc's argument that we should delay our consideration of the issue of whether new rate elements are needed in order to coordinate this issue with the Commission's treatment of issues in the North American Numbering Plan Proceeding and with anticipated overall revisions to the Access Charge Rules. We believe that delaying action in this proceeding, as Ad Hoc requests, is unnecessary and conclude that prompt action on these waivers serves the public interest by facilitating the introduction of 500 access service. We also reject Nextel's request that we formally monitor the LECs' 500 access services to prevent unreasonable or discriminatory pricing. Based on the existing record, we find that the rate structure each LEC has proposed in its waiver petition is reasonable. In the tariff review process, we will undertake further review of LEC 500 access offerings to guard against discrimination. The waivers granted in this order are subject to action in future proceedings, however.

IV. ORDERING CLAUSES

35. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 5 and 201 - 205 of the Communications Act, 47 U.S.C. § 154(i), 155, 201-205, and Sections 0.91, 0.291, and 1.3 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, & 1.3 the petitionsh) for waiver filed by the Ameritech Operating Companies, the Bell Atlantic Telephone Companies, BellSouth Telecommunications, Inc., Cincinnati Bell Telephone Company, GTE Services Corporation, the NYNEX Telephone Companies, Pacific Bell, Rochester Telephone Corporation, the Southern New England Telephone Company, Southwestern Bell Telephone Company, the United and Central Telephone Companies, and U S West Communications ARE GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

APPENDIX A

Parties Filing Comments, Petitions and Oppositions	Abbreviations
Ad Hoc Telecommunications Users Committee	Ad Hoc
Allnet Communications Services, Inc.	Allnet
The Ameritech Operating Companies	Ameritech
AT&T Corp.	AT&T
The Bell Atlantic Telephone Companies	Bell Atlantic
GTE Service Corporation	GTE
LDDS Communications, Inc.[79]	LDDS
MCI Telecommunications Corp.	MCI
Missouri Public Service Commission	Missouri PSC
Nextel Communications, Inc.	Nextel
Rochester Telephone Corporation	Rochester
Sprint Communications Company L.P.	Sprint
The Southern New England Telephone Company	SNET
Southwestern Bell Telephone Company	SWBT

Parties Filing Reply Comments	
AccessLine Technologies, Inc.	AccessLine
The Ameritech Operating Companies	Ameritech
AT&T Corp.	AT&T
The Bell Atlantic Telephone Companies	Bell Atlantic

[79] d/b/a LDDS Metromedia

BellSouth Telecommunications, Inc.	BellSouth
GTE Service Corp.	GTE
MCI Telecommunications Corp.	MCI
The NYNEX Telephone Companies	NYNEX
Pacific Bell	PacBell
Rochester Telephone Corporation	Rochester
The Southern New England Telephone Company	SNET
Southwestern Bell Telephone Company	SWBT
Sprint Communications, Inc.	Sprint
U S West Communications	U S West

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-259

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition Act
of 1992

Broadcast Signal Carriage Issues

ERRATUM

Released: November 22, 1994

The *Memorandum Opinion and Order*, FCC 94-251, released November 4, 1994, in the above-captioned proceeding is corrected as follows:

1. The third to last sentence in paragraph 83 is corrected to state:

> "In addition, and in recognition of the concerns raised by WCA, we find that retransmission consent is not required if the broadcast signal reception service is received without a separate subscription charge and the antenna is either (1) owned by the subscriber or the building owner; or (2) under the control and available for purchase by the subscriber or building owner upon termination of service."

2. Section 76.64(e) is corrected to state:

> (e) The retransmission consent requirements of this section are not applicable to broadcast signals received by master antenna television facilities or by direct over-the-air reception in conjunction with the provision of service by a multichannel video program distributor provided that the multichannel video program distributor makes reception of such signals available without charge and at the subscribers option and provided further that the antenna facility used for the reception of such signals is either owned by the subscriber or the building owner; or under the control and available for purchase by the subscriber or the building owner upon termination of service.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

DETROIT INDEPENDENT SCHOOL DISTRICT Sumner, TX	File No. BPLIF-920714DB
TITUS COUNTY MEMORIAL HOSPITAL Mount Pleasant, TX	File No. BPLIF-930416DK
NORTH LAMAR SCHOOL DISTRICT Paris, TX	File No. BPLIF-930416DL
TEXARKANA INDEPENDENT SCHOOL DISTRICT Texarkana, TX	File No. BPLIF-930416EP
ATOKA KIAMICHI AREA VO-TECH Kenefic, OK	File No. BPLIF-921123DC

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels D1, D2,
D3, and D4.

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1994; Released: December 19, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Detroit Independent School District (Detroit), Titus County Memorial Hospital (Titus), North Lamar School District (Lamar), Texarkana Independent School District (Texarkana), and Atoka Kiamichi Area Vo-Tech (Atoka), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels D1-D4 in the areas of Sumner, Mount Pleasant, Paris, and Texarkana, Texas, and Kenefic, Oklahoma, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Each applicant is qualified to be an ITFS licensee. Detroit, Lamar, and Texarkana are school districts accredited by the Texas Education Agency. These applicants propose to serve the formal educational needs of students enrolled in schools located both within and outside their jurisdictions. Titus is a non-profit organization whose purposes are educational and include providing service to accredited schools and local medical facilities. Titus is accredited by the Joint Commission on the Accreditation of Healthcare Organizations. See 47 C.F.R. Section 74.932(a). Atoka is a vocational school accredited by North Central University that proposes to provide formal educational programming to its own students and to other schools in the area.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being local. Detroit, Lamar, and Texarkana are school districts serving the formal educational needs of schools within their own jurisdictions. Titus is providing ITFS service in the area where its facilities are located. Atoka is serving the formal educational needs of its own students, as well as other students enrolled in schools in the area.

Accreditation. Detroit, Lamar, and Texarkana are entitled to three points for being accredited. They are accredited by the Texas Education Agency. Atoka, accredited by North Central University, is also entitled to three points for accreditation. With respect to Titus, the Commission has specifically held that hospitals and medical consortia do not qualify as accredited institutions a for the purpose of receiving accreditation points. *Instructional Television Fixed Service-Reconsideration of Second Report and Order in MM Docket No. 83-523,* 59 RR 2d 1355, 1371 (1986). See also, *Mooreland Public Schools,* 9 FCC Rcd 527 (1994). Thus, Titus is not entitled to the three points for accreditation.

Four-Channel Limitation. No applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.,* 7 FCC Rcd 5924 (1992).

Detroit's illustrative schedule and programming grid propose an average of 24.375 hours of formal educational programming per channel per week. Thus, Detroit is entitled to one programming merit point. Because the illustrative schedules and programming grids submitted by the other applicants do not establish the threshold amount at which merit points are awarded, none of these applicants is entitled to any programming merit points.

The illustrative schedule and programming grid of Titus propose averages of only 9.25 hours of formal educational programming and 13.75 hours of other ITFS programming per channel per week. There are inconsistencies between the amounts of programming set forth in the illustrative schedules and programming grids of Lamar, Texarkana and Atoka. Using the lesser amounts specified, Lamar and Texarkana are deemed to have each proposed averages of 19.625 hours of formal educational programming per channel per week. Similarly, Atoka is deemed to have proposed averages of 10 hours of formal educational programming and 14 hours of other ITFS programming per channel per week. Again, the amounts of programming proposed are not sufficient to entitle any of these applicants to any programming merit points.

E- and F- Channel Group Relocation. No applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, no applicant is entitled to the one point for such applicants.

Total. Detroit is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming, for a total of ten points. Lamar, Texarkana, and Atoka are entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation, for a total of nine points each. Titus is entitled to four points for being local and two points for observing the four-channel limitation, for a total of six points. Thus, the selectee is Detroit. While the application of Texarkana is only directly mutually exclusive with the application of Titus, it is considered in the mutually exclusive group with Detroit since Detroit and Titus are directly mutually exclusive. In view of our action denying the application of Titus, there is no longer any mutual exclusivity between Detroit and Texarkana, and the application filed by Texarkana also will be granted.

OTHER MATTERS

5. No determination has been made that the tower heights of three of the receive sites proposed by Detroit would not constitute a hazard to air navigation. Accordingly, any grant of a construction permit/license to Detroit will be appropriately conditioned.

6. Detroit and Texarkana propose to lease excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. Detroit has submitted a copy of its lease with RuralVision South, Inc., and Texarkana has submitted a copy of its lease with Wireless Communications, Inc. Both leases conform in all respects with our requirements. In addition, no petitions to deny or informal objections have been filed against either Detroit's application or that of Texarkana.

7. We find Detroit and Texarkana fully qualified to be ITFS licensees and conclude that grant of their applications would serve the public interest, convenience and necessity.

8. Accordingly, IT IS ORDERED, That the applications of Titus County Memorial Hospital (BPLIF-930416DK), North Lamar School District (BPLIF-930416DL), and Atoka Kiamichi Area Vo-Tech (BPLIF-921123DC) ARE DENIED, and the applications of Detroit Independent School District (BPLIF-920714DB) and Texarkana Independent School District (BPLIF-930416EP) ARE GRANTED.

9. IT IS FURTHER ORDERED, That the authorization issued to Detroit Independent School District shall be conditioned as follows:

> This authorization is subject to the condition that construction of the receive towers at receive site locations R-9, R-10, and R-11 is prohibited until clearance is received from the Federal Aviation Administration, the Commission is so notified, and the appropriate painting and lighting specifications are determined.

10. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

101 Applications for Authority
To Construct and Operate
Multipoint Distribution
Service Stations

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: November 10, 1994; Released: December 8, 1994

By the Commission:

Table of Contents

Title	Paragraphs
I. Introduction	1
II. Background	2-12
III. Petitions for Reconsideration	13-34
Cullman, Alabama	15-16
Lamar, Colorado	17-18
Grangeville, Idaho	19-20
Big Rapids, Michigan	21-22
Fergus Falls, Minnesota	23-24
Jal, New Mexico	25-26
Pendleton, Oregon	27-28
Ridgeway, Pennsylvania	29-30
Warsaw, Virginia	31-32
Portage, Wisconsin	33-34
IV. Discussion	35-58

I. INTRODUCTION

1. The Commission has before it petitions for reconsideration of the return, pursuant to delegated authority, of 101 applications for authority to construct and operate Multipoint Distribution Service (MDS)[1] stations on the E or F channels at the following ten transmitter sites: Cullman, Alabama; Lamar, Colorado; Grangeville, Idaho; Big Rapids, Michigan; Fergus Falls, Minnesota; Jal, New Mexico; Pendleton, Oregon; Ridgeway, Pennsylvania; Portage, Wisconsin; and Warsaw, Virginia. These 101 applications were filed with the Commission between June 6, 1991 and January 12, 1992, after the Commission had reopened the filing period for MDS applications on the E or F channels, subject to certain location restrictions. *See* § 10, *infra*.[2] As these petitions raise recurring, common issues,[3] we believe thattheir consideration *en masse* would be the most efficient use of Commission resources. Thus, we will consider these petitions for reconsideration in this omnibus order, which has been referred by the staff to the Commission pursuant to § 1.106(a) of the Commission's rules, 47 C.F.R. § 1.106(a).

II. BACKGROUND

2. Each of the returned applications proposed an MDS station on the E or F channels to which Part 21 of the Commission's rules apply. Section 21.20(a) of the rules sets forth the standards for returning MDS applications as unacceptable for filing:

> Unless the Commission shall otherwise permit, an application will be unacceptable for filing and will be returned to the applicant with a brief statement as to the omissions or discrepancies if:
>
> (1) The application is defective with respect to completeness of answers to questions, informational showings, execution, or other matters of a formal character; or
>
> (2) The application does not substantially comply with the Commission's rules, regulations, specific requests for additional information, or other requirements.

47 C.F.R. § 21.20(a). Section 21.20(b) lists examples of common deficiencies which result in defective applications under paragraph (a) such as, the "application does not demonstrate compliance with the special requirements applicable to the radio service involved," the "application

[1] The term MDS refers both to single channel and to multichannel stations used in the Multipoint Distribution Service (MDS). MDS stations on the E and F channel groups are sometimes referred to as Multichannel Multipoint Distribution Service (MMDS) stations. In this order, we use the terms MMDS and MDS stations on the E or F channel groups interchangeably.

[2] Several months after the last of these applications was filed, the Commission imposed a freeze on the filing of new applications for MDS stations in a rulemaking proceeding to further explore options which would expedite the processing of MDS applications. *Notice of Proposed Rulemaking*, PR Docket No. 92-80, 7 FCC Rcd 3266, 3270 (1992). The freeze does not apply to MDS applications for modification, renewal, assignment of license, transfer of control, extension of time to construct and signal boosters. *Id.* at 3271.

[3] All of the subject applications, upon review by Commission staff, were returned by individual return notification letters. Review of these applications and the Commission's data base indicates that for each named service area, the same transmitter site was proposed in each application. With few exceptions, which are noted in Section III, *infra*, the applications for each named service area contained identical interference narratives and made identical waiver and public interest showings. In addition, the arguments raised in the reconsideration petitions filed for each applicant were either identical or substantially similar to the arguments raised on behalf of the other petitioning applicants for the same service area.

does not include all necessary exhibits," and the "application is filed after the cut-off date prescribed in § 21.31 or § 21.914 of this part." 47 C.F.R. § 21.20(b)(4), (8) and (9); *see* 47 C.F.R. §§ 21.13, 21.15, 21.26 and 21.900.

3. *Mutual Exclusivity*. Typically, the first determination made by Commission staff is whether the MDS application is mutually exclusive with any previously filed application or authorized station. Section 21.31(a) of the Commission's rules provides the standard for this determination.

> The Commission will consider applications to be mutually exclusive if their conflicts are such that the grant of one application would effectively preclude by reason of harmful electrical interference, or other practical reason, the grant of one or more of the other applications. The Commission will presume "harmful electrical interference" to mean interference which would result in a material impairment to service rendered to the public despite full cooperation in good faith by all applicants or parties to achieve reasonable technical adjustments which would avoid electrical conflict.

47 C.F.R. § 21.31(a); *see* 47 C.F.R. § 21.902(c), (d) and (f).[4] In applying this standard, the staff evaluates whether the MDS applications were filed: (1) within 50 miles of an authorized or previously proposed MDS station,[5] and (2) within the radio horizon (with an unobstructed electrical path) of the protected service area of an authorized or previously proposed MDS station.[6] Applications which are determined to be either within 50 miles or with an unobstructed electrical path to any part of the protected service area of any station, are considered to be mutually exclusive with the station unless they demonstrate a lack of harmful interference pursuant to the standards specified in the Commission's rules. *See* 47 C.F.R. § 21.902(b)(3) and (4) and § § 6 and 7, *infra*. For the above-referenced MDS applications on the E or F channels, § 21.901(d)(5) also defines mutual exclusivity as based on whether the proposed transmitter site is within a Metropolitan Statistical Area (MSA) or its 15-mile buffer zone of an authorized or previously proposed station.[7]

4. *Cut-off Rules*. In order to be acceptable for filing, each of the above-referenced MDS applications was required to be filed on or before the applicable cut-off date for mutually exclusive applications.[8] By way of background, the

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[4] Section 21.31 of the rules explains how applications do not have to be directly mutually exclusive to be cut-off:

> For example, applications A, B, and C are filed in that order. A and B are directly mutually exclusive, B and C are directly mutually exclusive. In order to be considered comparatively with B, C must be filed within the "cut-off" period established by A even though C is not directly mutually exclusive with A.

47 C.F.R. § 21.31(c).

[5] MDS applicants must submit interference studies analyzing the potential for harmful interference with other MDS stations located within a 50 mile radius of the proposed station because "[i]t is possible for cochannel interference generated by one MDS station to cause unacceptable distortion of another station's signal from as far away as 50 miles." *R.L. Mohr*, 85 FCC 2d 596, 606 (1981); *see* §§ 21.901(d)(7) and 21.902(c)(1) and (2) (1991). The 50 mile benchmark for MDS stations was adopted in *Amendments of Parts 1, 2, 21 and 43 of the Commission's Rules and Regulations to Provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service*, 45 FCC 2d 616, 620-21 (1974) (hereinafter *MDS Allocation Order)*, which codified, as a rebuttable presumption, Commission policy as to what constitutes mutually exclusive status. *See also Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Radio Services (Other Than Maritime Mobile)*, 60 FCC 2d 549, 559 (1976) (hereinafter *Domestic Public Radio Services Order)*. The Commission adopted this 50 mile benchmark to enhance administrative efficiency in processing applications, avoid "gridlock" situations, and permit authorization of stations to proceed expeditiously. *See R.L. Mohr*, 85 FCC 2d at 604; *Sioux Valley Empire Elec. Ass'n, Inc.*, 2 FCC Rcd 7375, 7376 (Dom. Fac. Div. 1988).

[6] As the Commission noted in the MDS technical rulemaking order, "the mileage between these [MDS] stations is not the only factor that determines whether interference will occur." *Amendment of Parts 21, 74 and 94 of the Commission's Rules and Regulations with regard to the technical requirements applicable to the Multipoint Distribution Service, the Instructional Fixed Television Service and the Private Operational-Fixed Microwave Service (OFS)*, 98 FCC 2d 68, 90 (1984) (hereinafter *MDS Technical Order)*. In a 1990 order, *Texas Wired Music, Inc.*, File No. 50009-CM-P-90, Call Sign WDU282 (Dom. Fac. Div., released Aug. 27, 1990), we explained the basis for using the radio horizon as a standard for determining mutual exclusivity:

> [T]he latest engineering analysis of the [applicant] demonstrates that a natural phenomenon, radio horizon, substantially reduces the possibility of interference occurring to any receiver of [the authorized station] located in [its] protected service area. . . . Underlying this methodology is the premise that once the signal reaches its radio horizon it is generally blocked or attenuated to such a level that it is not likely to interfere with a receiver beyond that point. The amount of signal attenuation at this point is dependent upon the type of surface the signal encounters and generally ranges between 6 and 20 db.

[7] *See Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 94 FCC 2d 1203, 1262-64 (1983) (hereinafter *MDS Allocation Order)*. Section 21.901(d)(5), 47 C.F.R. § 21.901(d)(5) (1991), provides:

> Notwithstanding the provisions of Sec. 21.31(a) all applications that propose to locate transmission facilities within or within 15 miles of the border of a Standard Metropolitan Statistical Area (SMSA) will be considered together. In the case of a Standard Consolidated Statistical Area (SCSA) all applications that propose to locate facilities within or within 15 miles of the boundary of any SMSA contained in the SCSA will be considered together . . . . Each application will be entitled to comparative consideration or to be included in a lottery in only one such area.

[8] In *Domestic Public Radio Services Order*, 60 FCC 2d at 551 , we explained the purpose of our cut-off rule:

> [W]hat is commonly called our "cut-off" rule originated in our need for an orderly administrative procedure to control the disposition of our caseload. *See* 47 U.S.C. § 154(j). . . . [T]o provide early consolidation of competing applications and to prevent processing disruption by late

Commission initially authorized the filing of MDS applications on the E or F channels on one filing date, September 9, 1983. *See MMDS Allocation Order*, 94 FCC 2d at 1262-66; *Establishment of Multi-Channel Systems*, 48 Fed. Reg. 33,873, *as corrected* 48 Fed. Reg. 34,746 (1983). Thereafter, no additional applications for new stations were accepted for filing until April 20, 1988, pursuant to § 21.901(d)(4). Applications for the E or F channels which complied with specified restrictions could then be filed between April 20, 1988 and April 9, 1992. *See* § 10, *infra*.

5. If an MMDS application is mutually exclusive with a 1983 application or authorized station, the applicable cut-off date is September 9, 1983. *Establishment of Multi-Channel Systems*, 48 Fed. Reg. 34,746. If there is no mutually exclusive 1983 application or authorized station, but there is a mutually exclusive, post-1983, previously proposed or authorized station, the applicable cut-off rule for the above-referenced applications, all of which were filed after October 31, 1990, is § 21.914, which provides that:

> Notwithstanding the provisions of § 21.31(b)(2)(i) and (ii) of this part, to be entitled to a random selection process or to comparative consideration with one or more conflicting applications, an [MDS] application . . . must be received bythe Commission in a condition acceptable for filing on the same calendar day as the first of the conflicting applications is received by the Commission in a condition acceptable for filing.

47 C.F.R. § 21.914.[9]

6. *Station Design Requirement.* Section 21.902(b)(3) requires each MDS applicant to engineer its proposed station to provide at least 45 dB of interference protection within the protected service areas[10] of all other authorized or previously proposed cochannel stations. 47 C.F.R. § 21.902(b)(3). Section 21.902(b)(4) requires each MDS applicant to engineer its station to provide at least 0 dB of interference protection within the protected service areas of all other authorized or previously proposed adjacent channel stations. 47 C.F.R. § 21.902(b)(4). Section 21.902(f) defines harmful interference as the ratio of desired signal to undesired signal present in the cochannel or adjacent channel, at the output of a reference receiving antenna oriented to receive the maximum desired signal.[11]

7. *MDS Interference Studies.* At the time the above-referenced applications were filed, in order to demonstrate compliance with § 21.902(b), and so that mutually exclusive determinations could be made, § 21.902(c)(1) of the Commission's rules required that an MDS applicant include with the application an analysis of the potential for harmful cochannel interference with any authorized or previously proposed station if the applicant's proposed transmitting antenna had an unobstructed electrical path to any part of the protected service area of any other authorized or previously proposed cochannel station, or if the applicant's proposed transmitter is within 50 miles of the transmitter coordinates of any other authorized or previously proposed cochannel station.47 C.F.R. § 21.902(c)(1)(1991). In addition, § 21.902(c)(2) required that an MDS applicant include with the application an analysis of the potential for harmful adjacent channel interference if the applicant's proposed transmitting antenna had an unobstructed electrical path to any part of the protected service area of any other authorized or previously proposed adjacent channel station.47 C.F.R. § 21.902(c)(2) (1991); *see* 47 C.F.R. § 21.902(a), (b), (d) and (f). Section 21.901(d)(7) further requires that each MDS application for the E or F channels include the applicant's written statement of the techniques that would be employed at the proposed station to avoid interference with the operation of adjacent channel stations. The applicant must also show what steps it has taken to comply with the requirements of § 21.902(a), which requires MDS applicants, licensees, and conditional licensees, to make exceptional efforts to avoid harmful interference to other users and to avoid blocking potential adjacent channel stations in the same area and cochannel stations in nearby areas. 47 C.F.R. § 21.901(d)(7).

> filings, we require an application for a frequency, previously applied for, to be filed within a certain date. Competing applications filed after this date are considered to be "cut-off" from comparative consideration.

(citations omitted). *See also City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 663 (D.C. Cir. 1984) ("The cut-off rule basically serves two purposes. First, it advances the interest of administrative finality. . . . Second, it aids timely . . . applicants by granting them a 'protected status'. . . . ") (citations omitted).

[9] Section 21.914, commonly referred to as the "same day calendar rule," was adopted in order to address the problems caused by the volume of MDS applications filed by speculators, which had resulted in delays in the licensing process and overburdened the Commission's limited resources. *See Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 6410, 6413 (1990) (hereinafter *Wireless Cable Order); Order on Reconsideration*, 6 FCC Rcd 6764, 6771-72 (1991) (hereinafter *Wireless Cable Reconsideration Order), petition for review filed, United States Independent Microwave Television Ass'n v. FCC*, No. 91-1637 (D.C. Cir. filed Dec. 20, 1991) (held in abeyance by Court Order of February 21, 1992, pending action on second set of reconsideration petitions). Section 21.31(b) provides, in part, that in order to be entitled to comparative status:

> The application [must be] received by the Commission in a condition acceptable for filing by whichever "cut-off" date is earlier: (i) Sixty (60) days after the date of the public notice listing the first of the conflicting applications as accepted for filing, or (ii) One (1) business day preceding the day on which the Commission takes final action on the previously filed application (should the Commission act upon such application in the interval between thirty (30) and sixty (60) days after the date of its public notice.)

47 C.F.R. § 21.31(b)(2). Except for the September 9, 1983 cut-off date, § 21.31(b) is the cut-off provision for MDS applications on the E or F channels filed between April 20, 1988 and October 31, 1990.

[10] Section 21.902(d) defines the protected service area for MDS stations.

[11] Cochannel harmful interference exists if a free space calculation of the ratio of desired signal to undesired signal is less than 45 dB. Adjacent channel harmful interference exists if a free space calculation of this ratio is less than 0 dB. 47 C.F.R. § 21.902(f).

8. *Service Requirement.* In addition to submitting the required interference analyses to the Commission, an MDS applicant also must serve each required interference study upon the previously proposed or authorized station applicant, conditional licensee or licensee required to be studied, pursuant to § 21.902(g) of the Commission's rules. 47 C.F.R. § 21.902(g). The same rule requires that a list identifying each applicant, conditional licensee, and licensee served be submitted with the application.

9. *ITFS Interference Protection.* For MDS applications on the E or F channels which were filed beginning October 11, 1990 through December 29, 1991, the applicant also was required to file with the application, pursuant to 47 C.F.R. § 21.901(d)(1), an engineering analysis demonstrating a lack of harmful interference to each cochannel or adjacent channel Instructional Television Fixed Service (ITFS)[12] licensed station with a transmitter site within 50 miles of the proposed MDS transmitter site. In addition, a copy of the analysis had to be served on each affected ITFS licensee. In the alternative, the MDS applicant could submit a statement from the ITFS licensee stating that it did not object to the MDS operation.[13] *See Wireless Cable Order,* 5 FCC Rcd at 6413.

10. *Location Restrictions.* After the initial filing date of September 9, 1983, no filing period was designated until 1988. In accordance with § 21.901(d)(4) of the Commission's rules, the Commission then designated that MDS applications for E or F channel stations could be submitted for filing commencing April 20, 1988, *but only* for locations which were: (1) farther than 50 miles from any proposed location of an MDS application for the E or F channels pending on April 19, 1988, or an existing authorized facility, and (2) farther than 15 miles from the boundary of a statistical area for which there was an MDS application for the E or F channels pending as of April 19, 1988, or an existing authorized facility. *Public Notice, Common Carrier Bureau Opens Filing Period For Multichannel Multipoint Distribution Service Applications,* 3 FCC Rcd 2661 (1988) (hereinafter *1988 Public Notice).* The 1988 Public Notice also advised potential applicants that all applications must comply with the specified location restrictions, that grant of waivers of the location restrictions were not anticipated, and that applications failing to meet these location restrictions would be dismissed as unacceptable for filing. *Id.* at 2661-2662.

11. The 1988 location restrictions were a natural outgrowth of a policy that had provided certain efficiencies in the processing of MDS applications for channels 1, 2, and 2A. In 1981, we noted:

> At the inception of the MDS service in 1974 . . . we . . . established the presumption that no harmful interference would occur if stations were greater than 50 miles apart. If a proposed station were to be located 50 miles or closer to an existing station then we required (and still require) that the applicant submit an engineering showing of the possible impact it would have on the other station. The 50 mile presumption was primarily a processing standard to assist staff . . . . Our intention was to establish general standards which would permit authorization of operations to proceed in an expeditious manner.

R.L. Mohr, 85 FCC 2d at 604. *See also Sioux Valley,* 2 FCC Rcd at 7376. It was our experience prior to 1988 that there were fewer interference analyses submitted for authorized or previously proposed stations with transmitter sites beyond 50 miles of the subsequently proposed transmitter sites, but within the radio horizon, than for authorized or previously proposed stations within 50 miles. Without the need to review interference analyses for 1983 stations within 50 miles of the post-1983 MMDS applications' transmitter sites, scarce engineering resources instead could be used to review interference analyses filed for modification applications, or to make necessary engineering determinations on 1983 applications.

12. *Summary.* Thus, at the time the above-referenced applications were filed, applicants for new MMDS stations were required to file for a location farther than 50 miles from the location of any station proposed in an application which was pending on April 19, 1988, or of any existing facility, and farther than 15 miles from the boundary of a statistical area for which there was one or more MMDS applications pending on April 19, 1988, or an existing authorized facility. Applicants were permitted to file: (1) beyond 50 miles of a station proposed in an application pending on April 19, 1988 or an existing authorized station, as long as the location was also farther than 15 miles from the boundary of a statistical area for which there was one or more MMDS applications pending on April 19, 1988 or an existing authorized facility; (2) within 50 miles of a station proposed in an application filed after April 19, 1988; and (3) within the radio horizon with an unobstructed electrical path of any previously proposed or authorized station, proposed in an application filed after April 19, 1988. Applicants filing within these areas were required to file their applications before the applicable cut-off dates. Applicants also were required to engineer the proposed station to provide at least 45 dB of interference protection within the protected service areas of all other authorized or previously proposed cochannel stations and at least 0 dB of interference protection within the protected service area of all other authorized or previously proposed adjacent channel stations. In order to demonstrate compliance with these interference protection standards, applicants were directed to submit, as part of their application, interference studies which analyzed the potential for harmful cochannel and adjacent channel interference for all stations and pending applications within 50 miles or the radio horizon of the proposed station, and to serve those studies on the stations and applicants required to be stud-

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[12] *See* 47 C.F.R. §§ 74.901-74.996.

[13] For applications filed before October 11, 1990, the MDS conditional licensee for the E or F channels is required to file, prior to commencing construction, a consent statement from all cochannel and adjacent channel ITFS licensees with transmitters within 50 miles of the proposed MDS transmitter. In the event the MDS conditional licensee cannot obtain such a statement, it is required to submit a Petition for Declaratory Ruling of lack of harmful interference, together with the required interference analyses. *Wireless Cable Order,* 5 FCC Rcd at 6438, n.16; *see also People's Choice TV, Inc.,* 7 FCC Rcd 3628 (Dom. Fac. Div. 1992). The rule provision was later revised and codified as § 21.902(i). Thus, for MDS applications on the E, F or H channels filed on or after December 30, 1991, the required ITFS analysis or consent statement must be filed, pursuant to 47 C.F.R. § 21.902(i)(2)(1993), on or before the 60th day after the application is placed on public notice. *See Wireless Cable Reconsideration Order,* 6 FCC Rcd at 6771-72.

ied. In addition, for applications filed beginning October 11, 1990 through December 29, 1991, the MMDS applicant was also required to submit with its application either an engineering analysis demonstrating a lack of harmful interference to each cochannel or adjacent channel ITFS licensee with a transmitter site within 50 miles of the proposed MMDS transmitter site, or a no objection letter from each ITFS station licensee. Section 21.20 of the rules explicitly put all applicants on notice that failure to comply with these requirements would result in the return of their application as unacceptable for filing. Notice was also provided in the *MMDS Allocation Order*, 94 FCC 2d 1203, and *MDS Technical Order*, 98 FCC 2d 68.

III. PETITIONS FOR RECONSIDERATION

13. Identical or substantially similar petitions for reconsideration were filed for the 101 returned MMDS applications at 10 different transmitter sites. Petitioners contend that their applications fully complied with all pertinent Commission rules, or else presented facts which would compel the grant of any necessary waivers. In support, petitioners chiefly assert that the interference analyses submitted with their applications demonstrated that there is no realistic possibility of harmful interference to existing or proposed stations, and that to the extent the proposed stations failed to comply with the location restrictions in the *1988 Public Notice*, Commission precedent supports a grant of a waiver. Petitioners also argue that the staff incorrectly applied the *1988 Public Notice* location restrictions and other Commission rules, and provided insufficient detail in the letters returning the applications.

14. There follows a description of the applications filed for each of these locations, the reasons for the staff's disposition of each application, and the arguments presented in the petitions. As discussed in detail below, we conclude that the applications were defective because each applicant failed to submit and serve the required interference analyses for authorized and previously proposed MMDS stations. The applications were also properly returned as unacceptable for filing because they were filed within the geographic area of authorized or previously proposed MMDS stations, or within an MSA or its 15 mile buffer zone, b1 in violation of the specific filing requirements set forth in the *1988 Public Notice*, and presented no grounds justifying the grant of a waiver. Finally, these applications were mutually exclusive with an authorized station or previously filed application with an earlier cut-off date, and thus, not entitled to comparative consideration even if in a form acceptable for filing.

15. *Cullman, Alabama.* On January 21, 1992, certain petitioners filed 40 applications proposing the same transmitter site at Cullman, Alabama.[14] After reviewing each of these applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated March 3, 1993. The letters indicated that each application was returned because the applicant: (1) filed in the geographic area of other pending MMDS applications;[15] and (2) proposed a transmitter site within an MSA or its buffer zone in violation of the *MMDS Allocation Order* and § 21.901(d)(5).[16] With regard to the applicants' request for a waiver of the 50 mile location restriction contained in the *1988 Public Notice*, the return letters indicated that the applications failed to meet the waiver requirements in § 21.19, and that without a waiver, the applications were unacceptable for filing. Reconsideration petitions for the 40 returned applications were filed on April 2, 1993.

16. These 40 returned applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) one 1983 authorized MMDS station;[17] (2) 95 1983 previously proposed MMDS stations with applications pending on January 21, 1992, the filing date of the Cullman applications;[18] and (3) 143 post-1983 previously proposed MMDS stations with applications pending on January 21, 1992.[19] The applications did not include interference studies, as required by § 21.902(b) and (c), for 222 previously proposed stations. The interference studies that were submitted were inadequate in that they: (1) failed to include free space calculations of the desired to undesired signal ratio for each reference receiving antenna within the protected service area of the authorized or previously proposed stations as required by § 21.902(c), (d) and (f) (*see* § 21.902(e)); and (2) failed to demonstrate that the proposed station was engineered to provide 45 dB of cochannel interference protection pursuant to § 21.902(b)(3), and 0 dB of adjacent channel interference protection pursuant to § 21.902(b)(4). In addition, the applicants failed to satisfy the requirements for service of interference studies as provided in § 21.902(g). Thus, the Cullman applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

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[14] Application File Nos. 00892-CM-P-92 through 00906-CM-P-92; 00913-CM-P-92 through 00920-CM-P-92; 00922-CM-P-92; 00923-CM-P-92; 00927-CM-P-92 through 00930-CM-P-92; 00945-CM-P-92 through 00950-CM-P-92; and 00989-CM-P-92 through 00993-CM-P-92.

[15] This language refers to the applicant's non-compliance with the location restrictions contained in the *1988 Public Notice*. When this language is included in a return letter, it means that the applicant: (1) selected an incorrect transmitter site; (2) filed in an area not open for filing, and thus, on a date not designated by the Commission, in contravention of § 21.901(d)(4); and (3) filed past the relevant cut-off date, in that the applicant selected a transmitter site which makes the proposed station mutually exclusive with an authorized or previously proposed station.

[16] The Cullman applicants filed within the Birmingham, Alabama MSA or its buffer zone.

[17] WLR564 in Huntsville, Alabama.

[18] These 95 1983 applications include 44 applications for Huntsville, Alabama, three applications for Gadsen, Alabama, and 48 applications for Birmingham, Alabama (including, but not limited to, Application File Nos. 02756-CM-P-83; 04439-CM-P-83; 02145-CM-P-83; 10562-CM-P-83; 03386-CM-P-83; 08539-CM-P-83; and 11491-CM-P-83). Application File No. 08539-CM-P-83 was subsequently authorized (WHT710 in Birmingham, Alabama).

[19] These 143 applications, which were filed more than a year before the returned applications were filed, also specified a transmitter site at Cullman (including Application File Nos. 52767-CM-P-92; 52768-CM-P-92 through 52797-CM-P-92; 52800-CM-P-92 through 52834-CM-P-92; 52754-CM-P-92 through 52766-CM-P-92; 52701-CM-P-92 through 53729-CM-P-92; 52753-CM-P-92; and 52730-CM-P-92 through 52752-CM-P-92).

17. *Lamar, Colorado.* On June 6, 1991, certain petitioners filed two applications proposing the same transmitter site at Lamar, Colorado.[20] After reviewing each of these applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters mailed January 19, 1993. The letters indicated that each application was returned because the applicant filed in the geographic area of other pending MMDS applications. Reconsideration petitions for the two returned applications were filed on February 10, 1993.

18. These two returned applications propose a transmitter site that is within 50 miles or the radio horizon of 41 post-1983 previously proposed MMDS stations with applications pending on June 6, 1991, the filing date of the Lamar applications.[21] The applications did not include interference studies, as required by § 21.902(b) and (c), for all 41 previously proposed stations. In addition, the applicants failed to satisfy the requirements for service of the interference studies as provided in § 21.902(g). Thus, the Lamar applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to previously proposed stations. No waiver requests were included in the Lamar applications.

19. *Grangeville, Idaho.* On December 2, 1991, certain petitioners filed three applications proposing the same transmitter site at Grangeville, Idaho.[22] On December 3, 1991, three additional petitioners filed three applications proposing the same Grangeville transmitter site.[23] After reviewing each of these applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated June 23, 1993 or June 30, 1993. The letters indicated that each application was returned because the applicant: (1) submitted inadequate interference analyses due to applicants' failure to serve all affected parties pursuant to § 21.902(g) and/or failed to consider all previously proposed or authorized ITFS or MMDS stations pursuant to §§ 21.902(c) and/or 21.902(i); and (2) proposed a station in an area not open for filing pursuant to § 21.901(d)(4) in that the applications were filed in the geographic area of an authorized MMDS station or a pending MMDS application and thereby failed to meet the criteria established in the *1988 Public Notice*. The June 30, 1993 return letters added that the applications filed on December 3, 1991 were filed past the relevant cut-off period established in §§ 21.31 and 21.914. Reconsideration petitions for the six returned applications were filed on July 16, 1993.

20. These six returned applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) two 1983 authorized MMDS stations;[24] and (2) 136 post-1983 previously proposed MMDS stations with applications pending on December 2 and 3, 1991, the filing dates of the Grangeville applications.[25] Additionally, the three applications filed on December 3, 1991 are within 50 miles or the radio horizon of an additional 35 post-1983 previously proposed MMDS stations with applications pending on December 3, 1991,[26] and did not include interference studies with the applications, as required by § 21.902(b) and (c), for these 35 previously proposed stations. The interference studies that were submitted were inadequate in that they: (1) used incorrect antenna specifications; (2) indicated terrain blockage, but did not include supporting demonstrations, such as shadow maps or terrain profiles; and (3) failed to demonstrate that the proposed station was engineered to provide 45 dB of cochannel interference protection pursuant to § 21.902(b)(3), and 0 dB of adjacent channel protection pursuant to § 21.902(b)(4). In addition, these applicants failed to satisfy the requirements for service of interference studies as provided in § 21.902(g). Thus, the Grangeville applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations. No waiver requests were included in the Grangeville applications.

21. *Big Rapids, Michigan.* On July 31, 1991, certain petitioners filed five applications proposing the same transmitter site at Big Rapids, Michigan.[27] After reviewing each of these applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated March 10, 1993. The letters indicated that each application was returned because the applicant: (1) filed past the cut-off period established in §§ 21.31 or 21.914; and (2) filed in the geographic area of other pending MMDS applications. Reconsideration petitions for the five returned applications were filed on April 9, 1993.

22. These five returned applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) 25 1983 previously proposed MMDS stations at Muskegon, Michigan with applications pending on July 31, 1991, the filing date of the Big Rapids applications;[28] and (2) one post-1983 previously proposed MMDS station, with an application pending on July 31, 1991.[29] The applications did not include interference studies, as required by § 21.902(b) and (c), for 24 previously proposed stations. The interference studies that were submitted were inadequate in that they: (1) failed to include free space calculations of the desired to undesired signal ratio for each reference receiving antenna within the protected service area of the authorized or previously proposed stations as required by §

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[20] Application File Nos. 59584-CM-P-91 and 59586-CM-P-91.

[21] All 41 applications specify a transmitter site at Lamar, Colorado (including, but not limited to, Application File Nos. 52653-CM-P-91; 53443-CM-P-91; 53449-CM-P-91; 53532-CM-P-91; 53650-CM-P-91; and 55065-CM-P-91). Application File Nos. 53443-CM-P-91 and 53532-CM-P-91 were subsequently authorized (WMX200 and WMX203).

[22] Application File Nos. 52161-CM-P-92; 52183-CM-P-92; and 52184-CM-P-92.

[23] Application File Nos. 52196-CM-P-92; 51298-CM-P-92; and 52202-CM-P-92.

[24] WHT783 and WHT784 in Spokane, Washington.

[25] All 136 applications specify a transmitter site at Lewiston, Idaho (including, but not limited to, Application File Nos. 54162-CM-P-90 through 54189-CM-P-90).

[26] These 35 applications include the three above-referenced applications filed on December 2, 1991, and 32 additional applications filed on the same date for the same Grangeville transmitter site (Application File Nos. 52158-CM-P-92 through 52192-CM-P-92).

[27] Application File Nos. 61201-CM-P-91; 61203-CM-P-91; 61213-CM-P-91; 61214-CM-P-91; and 61234-CM-P-91.

[28] These 25 applications for Muskegon (including, but not limited to, Application File Nos. 04581-CM-P-83; 07163-CM-P-83; 10357-CM-P-83; 11728-CM-P-83; 13622-CM-P-83; and 16352) specified six different transmitter sites in or near Muskegon. Application File Nos. 07163-CM-P-83 and 16352-CM-P-83 were subsequently authorized (WMH509 and WMH389).

[29] This application (Application File No. 50186-CM-P-90) specified a transmitter site at Cadillac, Michigan.

21.902(c), (d) and (f) (*see* § 21.902(e)); (2) indicated terrain blockage, but did not include supporting demonstrations, such as shadow maps or terrain profiles; (3) used incorrect methodology to calculate the protected service area of previously proposed stations; (4) used incorrect antenna specifications; and (5) contained incorrect technical parameters for the previously proposed and the newly proposed stations such as the transmitting antenna gain and the reference receiving antenna gain. In addition, these applicants also failed to satisfy the requirements for service of interference studies as provided in § 21.902(g). Thus, the Big Rapids applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to previously proposed stations. The Big Rapids applications did not include a request for a waiver of any Commission rules.

23. *Fergus Falls, Minnesota.* On July 11, 1991, certain petitioners filed two applications proposing the same transmitter site at Fergus Falls, Minnesota.[30] After reviewing each of these applications, the Commission staff returned both applications as defective and unacceptable for filing by return notification letters dated March 17, 1993. The letters indicated that the applications were returned because the applicant: (1) filed past the relevant cut-off date established in §§ 21.31 or 21.914; and (2) filed in the geographic area of authorized and pending MMDS stations. The return letter for Application File No. 60585-CM-P-91 also indicated that the application was returned because the applicant submitted inadequate interference analyses under § 21.902 due to applicant's failure to serve all affected parties pursuant to § 21.902(g) and/or failure to consider all previously proposed or authorized ITFS or MMDS stations pursuant to § 21.902(c) and/or 21.902(i). Reconsideration petitions for the two returned applications were filed on April 21, 1993.[31]

24. These two returned applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) two 1983 authorized stations;[32] (2) four 1983 previously proposed MMDS stations with applications pending on July 11, 1991, the filing date of the Fergus Falls applications;[33] and (3) three post-1983 authorized MMDS stations.[34] The interference studies that were submitted with the applications were inadequate in that they: (1) failed to include free space calculations of the desired to undesired signal ratio for each reference receiving antenna within the protected service area of the authorized or previously proposed stations, as required by § 21.902(c), (d), and (f) (*see* § 21.902(e)); (2) contained incorrect technical parameters for the authorized or previously proposed stations such as the transmitting antenna gain and the reference receiving antenna gain; (3) indicated terrain blockage, but did not include supporting demonstrations, such as shadow maps or terrain profiles; (4) used incorrect antenna specifications; and (5) failed to demonstrate that the proposed station was engineered to provide 45 dB of cochannel interference protection pursuant to § 21.902(b)(3), to a previously authorized station to which the proposed transmitting antenna has an unobstructed electrical path. In addition, the ITFS study filed by the applicants is invalid, pursuant to § 21.901(d)(1), because incorrect technical specifications for an ITFS station were used.[35] Thus, the Fergus Falls applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations. No waiver requests were included in the Fergus Falls applications.

25. *Jal, New Mexico.* On February 7, 1991, certain petitioners filed two applications proposing the same transmitter site at Jal, New Mexico.[36] After reviewing each of these applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated May 19, 1993. The letters indicated that each application was returned because the applicant: (1) filed past the cut-off period established in §§ 21.31 or 21.914; (2) filed in the geographic area of other pending MMDS applications; and (3) submitted inadequate interference analyses by failing to serve all affected parties pursuant to § 21.902(g) and failed to consider all previously proposed or authorized ITFS or MMDS stations in the proposed area. Reconsideration petitions for the two applications were filed on June 16, 1993.

26. These two returned applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) one 1983 previously proposed MMDS station with an application pending on February 7, 1991, the filing date of the Jal applications;[37] and (2) 192 post-1983 previously proposed MMDS stations with applications pending on February 7, 1991.[38] The applications did not include interference studies, as required by § 21.902(b) and (c), for all 193 previously proposed stations. The interference narrative that was submitted with the applications, and which concluded that there were no existing or pending stations within 50 miles, was inadequate in that it failed to include free space calculations of the desired to undesired signal ratio for each reference receiving antenna within the protected service area of the previously proposed stations, as required by § 21.902(c), (d) and (f). *See* § 21.902(e). In addition, the applicants failed to satisfy the requirements for service of interference studies as provided in § 21.902(g). Thus, these Jal applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to previously proposed stations. No waiver requests were included in the Jal applications.

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[30] Application File Nos. 60540-CM-P-91 and 60585-CM-P-91.

[31] The reconsideration petitions were filed five days after expiration of the period for filing of such petitions. *See* 47 U.S.C. § 405; 47 C.F.R. § 1.4(b)(5). The petitioners offered no explanation for their late filing.

[32] WHT606 in Alexandria, Minnesota and WLW839 in Fargo, North Dakota.

[33] All four applications specify a transmitter site at Fargo, North Dakota (Application File Nos. 00468-CM-P-83; 00623-CM-P-83; 02417-CM-P-83; and 04408-CM-P-83).

[34] WLW783 and WLW784 in Garfield, Minnesota, and WLK300 in Fargo, North Dakota.

[35] The returned applications were required to submit interference analyses for ITFS Station WHR743 in Ashby, Minnesota.

[36] Application File Nos. 57648-CM-P-91 and 57658-CM-P-91.

[37] Application File No. 16625-CM-P-83.

[38] These 192 applications include 172 applications for Odessa, Texas, and 20 applications for Hobbs, New Mexico (including, but not limited to, Application File Nos. 50827-CM-P-90; 55300-CM-P-90 through 55319-CM-P-90; 54105-CM-P-91; 54143-CM-P-91; 55029-CM-P-91; 54134-CM-P-91 through 54137-CM-P-91; 54166-CM-P-91; 54156-CM-P-91; and 54144-CM-P-91).

27. *Pendleton, Oregon.* On September 27, 1991, certain petitioners filed seven applications proposing the same transmitter site at Pendleton, Oregon.[39] After reviewing each of these applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated September 17, 1992. The letters indicated that each application was returned because the applicant: (1) filed past the cut-off period established in §§ 21.31 or 21.914; (2) filed in the geographic area of authorized or pending MMDS applications; and (3) did not comply with the Commission's requirements for a waiver, and that without a waiver, the applications were unacceptable for filing. Reconsideration petitions for the seven returned applications were filed on October 16, 1992.

28. These seven returned applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) 11 1983 previously proposed MMDS stations with applications pending on September 27, 1991, the filing date of the Pendleton applications;[40] and (2) 164 post-1983 previously proposed MMDS stations with applications pending on September 27, 1991.[41] The applications did not include interference studies, as required by § 21.902(b) and (c), for 95 previously proposed MMDS stations. The interference studies that were submitted were inadequate in that they: (1) contained incorrect technical parameters for authorized or proposed stations such as the transmitting antenna gain; (2) used incorrect methodology in calculating the protected service area of previously proposed stations which specified a directional transmitting antenna, calculating the protected service area as the area of a circle with a radius of 15 miles instead of calculating it pursuant to § 21.902(d)(1); (3) indicated terrain blockage, but did not include supporting demonstrations, such as shadow maps or terrain profiles; (4) failed to demonstrate that the proposed station was engineered to provide 45 dB of cochannel interference protection pursuant to § 21.902(b)(3), and 0 dB of adjacent channel interference protection pursuant to § 21.902(b)(4); and (5) used incorrect antenna specifications. In addition, the applicants failed to satisfy the requirements for service of interference studies as provided in § 21.902(g). Thus, the Pendleton applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations.

29. *Ridgeway, Pennsylvania.* On December 6, 1991, certain petitioners filed two applications proposing the same transmitter site at Ridgeway, Pennsylvania.[42] After reviewing each of these applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letter dated January 29, 1993. The letters indicated that each application was returned because the applicant filed in the geographic area of other pending MMDS applications. Reconsideration petitions for the two returned applications were filed on March 1, 1993.

30. These two returned applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) two 1983 previously proposed MMDS stations with applications pending on December 6, 1991, the filing date of the Ridgeway applications;[43] and (2) 13 post-1983 previously proposed MMDS stations, with applications pending on December 6, 1991.[44] The applications did not include interference studies, as required by § 21.902(b) and (c), for all 15 previously proposed MMDS. Thus, the Ridgeway applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations. No waiver requests were included in the Ridgeway applications.

31. *Warsaw, Virginia.* On November 12, 1991, certain petitioners filed 21 applications proposing the same transmitter site at Warsaw, Virginia.[45] After reviewing each of these applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated October 20, 1992. The letters indicated that the applications were returned because each applicant filed in the geographic area of pending MMDS applications. Reconsideration petitions for the 21 returned applications were filed on November 5, 1992.

32. These 21 returned applications propose a transmitter site that is within 50 miles or the radio horizon of 15 1983 previously proposed MMDS stations with applications pending on November 12, 1992, the filing date of the Warsaw applications.[46] The applications did not include interference studies with the applications, as required by § 21.902(b) and (c), for one previously proposed MMDS station. The interference studies that were filed were inadequate in that they: (1) failed to include free space calculations of the desired to undesired signal ratio for each reference receiving antenna within the protected service

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[39] Application File Nos. 62380-CM-P-91; 62388-CM-P-91; 62395-CM-P-91; 62399-CM-P-91; 62405-CM-P-91; 62418-CM-P-91; and 62427-CM-P-91.

[40] All 11 applications specify a transmitter site at Richland, Washington (Application File Nos. 01651-CM-P-83; 04548-CM-P-83; 04147-CM-P-83; 00567-CM-P-83; 07130-CM-P-83; 10594-CM-P-83; 10895-CM-P-83; 11695-CM-P-83; 13589-CM-P-83; 14027-CM-P-83; and 15710-CM-P-83). Application File No. 10895-CM-P-83 was subsequently authorized (WML477).

[41] These 164 applications include one application for Richland, Washington, two applications for Walla Walla, Washington, 80 applications for La Grande, Oregon, and 81 applications for Pendleton, Oregon (including, but not limited to, Application File Nos. 55986-CM-P-91; 56016-CM-P-91; 56450-CM-P-91; 56540-CM-P-91; 56449-CM-P-91; and 57569-CM-P-91).

[42] Application File Nos. 52231-CM-P-92 and 52234-CM-P-92.

[43] Both applications, Application File Nos. 06723-CM-P-83 and 16640-CM-P-83, specify a transmitter site at State College, Pennsylvania. Application File No. 06723-CM-P-83 was subsequently authorized (WHM366).

[44] All 13 applications specified a transmitter site at Clarion, Pennsylvania (including, but not limited to, Application File Nos. 51304-CM-P-92 through 51314-CM-P-92).

[45] Application File Nos. 51699-CM-P-92 through 51702-CM-P-92; 51705-CM-P-92 through 51707-CM-P-92; 51709-CM-P-92; 51713-CM-P-92; 51716-CM-P-92; 51717-CM-P-92; 51728-CM-P-92; 51729-CM-P-92; 51733-CM-P-92; 51734-CM-P-92; 51738-CM-P-92; 51739-CM-P-92; 51743-CM-P-92; 51746-CM-P-92; 51750-CM-P-92; and 51751-CM-P-92.

[46] These 15 applications include two applications for Washington, D.C., (Application File Nos. 02880-CM-P-92 and 11849-CM-P-83) and 13 applications for Richmond, Virginia (Application File Nos. 00215-CM-P-83; 00684-CM-P-83; 01652-CM-P-83; 02509-CM-P-83; 03470-CM-P-83; 04020-CM-P-83; 04036-CM-P-83; 06094-CM-P-83; 06710-CM-P-83; 07921-CM-P-83; 11562-CM-P-83; 12556-CM-P-83 and 15157-CM-P-83). Application File No. 15157-CM-P-83 was subsequently authorized (WHT736 in Richmond, Virginia).

area of authorized or previously proposed stations as required by § 21.902(c), (d), and (f) (*see* § 21.902(e)); (2) contained incorrect technical parameters for authorized or proposed stations such as the transmitting antenna gain and the reference receiving antenna gain; (3) indicated terrain blockage, but did not include supporting demonstrations, such as shadow maps or terrain profiles; and (4) used incorrect antenna specifications. These applicants also failed to comply with the requirements of § 21.901(d)(1) for ITFS interference protection because free space calculations were not submitted for each registered receive site of each ITFS licensee with an authorized transmitter site within 50 miles of the proposed MMDS stations' proposed transmitter site.[47] In addition, the applicants failed to satisfy the requirements for service of interference studies as provided in § 21.902(g). Thus, the Warsaw applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations. No waiver requests were included in the Warsaw applications.

33. *Portage, Wisconsin.* On October 2, 1991, certain petitioners filed 14 applications proposing the same transmitter site at Portage, Wisconsin.[48] After reviewing each of these applications, the Commission staff returned each application as defective and unacceptable for filing by return notification letters dated October 15, 1992. The letters indicated that each application was returned because the applicant filed in the geographic area of other pending MMDS applications. Reconsideration petitions for 13 returned applications were filed on November 5, 1992, and for one returned application on November 30, 1992.[49]

34. These 14 returned applications propose a transmitter site that is within 50 miles or the radio horizon of: (1) one 1983 authorized MMDS stations;[50] (2) two 1983 proposed MMDS station, with applications pending on October 2, 1991, the filing date of the Portage applications;[51] (3) one post-1983 authorized MMDS station;[52] and (4) 23 post-1983 previously proposed MMDS stations with applications pending on October 2, 1991.[53] The applications did not include interference studies, as required by § 21.902(b) and (c), for two authorized stations and 20 previously proposed stations. The interference studies that were submitted were inadequate in that they: (1) failed to include free space calculations of the desired to undesired signal ratio for each reference receiving antenna within the protected service area of the previously proposed or authorized stations, as required by § 21.902(c), (d) and (f) (*see* § 21.902(e)); and (2) contained incorrect technical parameters such as the transmit antenna gain and the reference receive gain. The ITFS study filed by the applicants is invalid, pursuant to § 21.901(d)(1), because incorrect technical specifications for5ITFS stations were used.[54] In addition, the applicants failed to satisfy the requirements for service of interference studies as provided in § 21.902(g). Thus, the Portage applicants failed to demonstrate that the stations proposed in the returned applications would not cause harmful interference to authorized or previously proposed stations. No waiver requests were included in the Portage applications.

IV. DISCUSSION

35. *Untimely Petitions for Reconsideration.* As a preliminary matter, we note that three petitions for reconsideration were untimely filed.[55] Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, requires that petitions for reconsideration "must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of."[56] Because the time period for filing petitions for reconsideration is prescribed by statute, the Commission may not ordinarily waive or extend the filing period. *Reuters Limited v. FCC,* 781 F.2d 946, 952 (D.C. Cir. 1986) ("[W]e conclude that the Commission acted beyond its lawful authority when it entertained the belated petition for reconsideration."); *Metromedia, Inc.,* 56 FCC 2d 909 (1975) (Commission may not waive 30 day filing period to accept a petition for reconsideration filed one day late). Here, the untimely petitions were filed between three and 16 days late and these petitioners have offered no justification for their late filing.[57] Due to these applicants'

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[47] The returned applications were required to submit interference analyses for ITFS Stations WHF243 (King William, Virginia) and WHG411 (Mathews, Virginia).

[48] Application File Nos. 50006-CM-P-92; 50008-CM-P-92; 50041-CM-P-92; 50049-CM-P-92; 50051-CM-P-92; 50059-CM-P-92; 50061-CM-P-92; 50062-CM-P-92; 50070-CM-P-92; 50083-CM-P-92; 50088-CM-P-92; 50097-CM-P-92; 50023-CM-P-92; and 50057-CM-P-92.

[49] The reconsideration petition for Application File No. 50023-CM-P-91 was filed 46 days after the date of the return letters mailed to the Portage applicants, and thus is untimely. *See* 47 U.S.C. § 405; 47 C.F.R. § 1.4(b)(5). Petitioner offered no explanation for his late filing.

[50] WDU380 in Madison, Wisconsin.

[51] Application File Nos. 13869-CM-P-83 and 16652-CM-P-83, both specify a transmitter site in Milwakee, Wisconsin.

[52] WHT772 in Madison, Wisconsin.

[53] These 23 applications include one application for Waupun, Wisconsin; two applications for Mauston, Wisconsin; and 20 applications for Tomah, Wisconsin (including, but not limited to, Application File Nos. 59419-CM-P-91 through 59436-CM-P-91).

[54] The returned applications were required to submit interference analyses for ITFS Stations WHR815 and WHR671 in Madison, Wisconsin.

[55] Untimely petitions for reconsideration were filed for Application File Nos. 50023-CM-P-91; 60540-CM-P-91; and 60585-CM-P-91.

[56] Section 1.106(f) of the Commission's rules, 47 C.F.R. §1.106(f), which implements this statutory mandate, establishes that a petition for reconsideration must be filed within 30 days from the date of the return notification letter, or the date of public notice of the return action, if any, as those dates are defined in § 1.4 of the Commission's rules, 47 C.F.R. § 1.4.

[57] The Court of Appeals for the D.C. Circuit, in *Gardner v. FCC,* 530 F.2d 1086 (D.C. Cir. 1976), created a narrow exception to this rule by holding that the Commission may extend or waive the 30-day filing period in the "extraordinary case" where the late-filing is due to the Commission's failure to give a party timely notice of the action for which reconsideration is sought. Under the holding of *Gardner:*

> A petitioner has the burden to show (a) when and how he received notice in fact, (b) that the time remaining was inadequate to allow him reasonably to meet the 30-day requirement (from date of issuance) of § 405, and (c) that he moved for reconsideration promptly on receiving actual notice.

failure to comply with 47 U.S.C. § 405, the untimely petitions for reconsideration listed at n.55, *supra*, will be dismissed. We note, however, that even if we were to consider the merits of the arguments raised in the untimely petitions for reconsideration, we would still deny those petitions for the reasons discussed below.

36. *Mutual Exclusivity and Cut-off.* Based upon our review of the returned applications and publicly available information regarding authorized MMDS stations and pending applications, we conclude that the petitioned applications were untimely filed with respect to authorized stations or previously filed applications with which the returned applications were mutually exclusive. The determining factors we used to ascertain if the above-referenced MMDS applications were mutually exclusive pursuant to § 21.31(a) were whether the applications were filed: (1) within 50 miles of an authorized or previously proposed MMDS station;[58] (2) within the radio horizon (with an unobstructed electrical path) of the protected service area of an authorized or previously proposed MMDS station;[59] or (3) within an MSA, or its 15-mile buffer zone, for which there is an authorized or previously proposed MMDS station.[60] Each of these returned applications propose a transmitter site which made the proposed stations mutually exclusive, pursuant to §§ 21.31 or 21.914, with authorized or previously proposed MMDS stations. *See* § § 3-5, *supra.* Specifically, these returned applications were either mutually exclusive and cut-off with respect to: (1) a 1983 pending application or authorized station (for which the cut-off date was September 9, 1983); or (2) a post-1983 pending application or authorized station, which had a cut-off date prior to the filing date of the returned applications.[61] Thus, the above-referenced applications were properly returned as unacceptable for filing pursuant to § 21.31(d), which states:

> An application otherwise mutually exclusive with one [or] more previously filed applications, but filed after the appropriate date prescribed in paragraph (b)(2) of this section, will be returned without prejudice and will be eligible for refiling only after final action is taken by the Commission with respect to the previously filed application (or applications).

47 C.F.R. § 21.31(d).

37. We reject the contention of some petitioners that because the applications they filed for each community were filed on the same date as all other applications for that community, their applications could not have been filed past the cut-off period established in §§ 21.31 or 21.914. Whether an MDS application is cut-off is not determined solely by the date of filing *vis-a-vis* applications specifying the same transmitter site and proposing service to the same community, but also by: (1) whether, pursuant to 47 C.F.R. § 21.31, granting the application would result in harmful interference to any previously proposed or authorized station for which the cut-off date is past; or (2) whether, pursuant to 47 C.F.R. § 21.901(d)(5), the application proposes a transmitter site that is within or within 15 miles of the borders of an MSA, which has a previously proposed or authorized station for which the cut-off date is past. *See* § § 3-5, *supra.* As explained above, the above-referenced applications were cut-off by mutually exclusive, previously proposed or authorized stations which, although they specified cities different than the cities specified by the returned applications, would have received harmful interference from the stations proposed in the returned applications.

38. *Interference Protection.* At the very inception of MDS, the Commission established the principle that subsequently filed applications must not cause harmful interference to any previously proposed or authorized MDS station. "Of course, the applicant for the second channel sought will be expected to demonstrate that his system is designed so that significant interference will not occur with respect to the first MDS channel. . . ." *MDS Allocation Order,* 45 FCC 2d at 621. Almost ten years before the above-referenced applications were filed, the Commission explained its emphasis on this requirement for MDS applications:

> It is possible for co-channel interference generated by one MDS station to cause unacceptable distortion of another station's signal from as far away as 50 miles. Section 21.90[2](c) of our Rules therefore requires an MDS application to include an interference study containing an analysis of the potential for harmful interference with other MDS stations located within a 50 mile radius of the proposed station.

R.L. Mohr, 85 FCC 2d 596, 606 (1981).[62] We have also recognized that "the demonstration of interference protection, at the time of filing, aids the Commission in the public interest determination that an applicant is technically qualified to be an MDS/MMDS licensee." *Family Entertainment Network, Inc.,* 9 FCC Rcd 566, 567-68, n.10 (Dom. Fac. Div. 1994). Thus, § 21.902(b) requires all MDS applicants and licensees to provide 45 dB of cochannel

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Gardner, 530 F.2d at 1091-92, n.24. The untimely petitioners here do not even acknowledge their tardiness in filing, much less attempt to meet this stringent burden of proof.

[58] *MDS Allocation Order,* 45 FCC 2d at 620-21.

[59] *MMDS Technical Order,* 98 FCC at 109-111.

[60] *MMDS Allocation Order,* 94 FCC 2d at 1262-64.

[61] Of these 101 returned applications, each was mutually exclusive and cut-off by previously filed MDS applications, with a cut-off date of September 9, 1983, except for: (1) the two returned Lamar applications, which were mutually exclusive with and cut-off by applications filed for Lamar on October 24, 1990, with a public notice date of February 24, 1991, including authorized station WMX203; and (2) the three returned Grangeville applications, which were mutually exclusive with and cut-off by applications filed on March 23, 1991 for Lewiston, Idaho (with a public notice date of March 23, 1991), on September 30, 1991 for Colfax, Washington, and on November 16, 1990 for LaGrande, Oregon (with a public notice date of November 12, 1991). Thus, in a *de novo* review, we have determined that each of the 101 returned applications was mutually exclusive and cut-off by an authorized station or previously filed application.

[62] The distance was extended in 1984 to the radio horizon with an unobstructed electrical path of the applicant's MDS station. *MDS Technical Order,* 98 FCC 2d at 111. Subsequent to the filing of the last of these 101 returned applications, the distance was extended to 100 miles. *Amendment of Parts 1, 2 and 21 of the Commission's Rules,* 8 FCC Rcd 1444, 1448 (1993).

interference protection and 0 dB of adjacent channel interference protection,[63] and to demonstrate that protection in interference studies submitted with the applications.

39. Petitioners' applications failed to demonstrate a lack of harmful interference to existing and previously proposed MMDS stations. As discussed in Section II, *supra*, applicants for new MDS stations on the E or F channels are required to file specific technical interference protection showings for cochannel and adjacent channel stations. These interference showings are a significant requirement because the Commission, in reallocating the E and F channels from ITFS to MDS, did so with the understanding that certain adjacent channel interference problems might arise. The Commission also anticipated that some authorized cochannel stations would be spaced more closely than ordinarily allowed and require careful planning and engineering. *MMDS Allocation Order*, 94 FCC 2d at 1246, 1264. Thus, the Commission stressed that "we expect applicants to address this problem in their applications. Those applications that do not contain an analysis of how the applicant intends to avoid cochannel interference in adjacent areas will not be considered acceptable for filing." *Id.* at 1264. *See also* § 21.902(b) and (c). Consequently, there have been a series of cases emphasizing the importance of interference protection showings in MDS applications for the E or F channels.[64]

40. Applicants for two locations failed to file and serve *any* interference analyses for existing or previously proposed MDS stations with transmitter sites within 50 miles or the radio horizon with an unobstructed electrical path of the applicants' proposed stations. *See, e.g.*, § § 17-18, 25-26, *supra*. Our analysis of the interference statements submitted shows that the returned applications failed, *inter alia*, to provide at least 45 dB of cochannel interference protection or at least 0 dB of adjacent channel interference protection as required by § 21.902(b); failed to submit free space calculations of the desired to undesired signal ratios to each reference receiving antenna within the protected service area of the previously proposed stations as required by § 21.902(f); failed to demonstrate terrain blockage (*see* § 21.902(d)); used incorrect methodology in performing the interference study (*see* Section 21.902(d)); and contained incorrect technical specifications for the petitioner's station or the previously proposed station. *See Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5716-17 (1987) ("Coordination of MDS . . . systems . . . relies on accurate data about the interference environment.") Thus, these applications were properly returned as unacceptable for filing. *See MMDS Technical Order*, 98 FCC 2d at 93 ("An application that proposes cochannel or adjacent channel operation and does not contain a showing that the proposed operation will not cause harmful interference as described herein will not be accepted for filing."); *see also Family Entertainment*, 9 FCC Rcd at 567 ("[T]he filing of an interference analysis, which demonstrates lack of harmful interference, is considered a basic requirement in determining the acceptability of an application."); *Dan S. Bagley, Jr.*, 7 FCC Rcd 4002, 4003 (Dom. Fac. Div. 1992) ("In the processing of MDS station applications, the interference analyses required by [§ 21.902] are crucial.")

41. *Notice to Affected Parties.* In addition, each applicant failed to serve, as required by § 21.902(g), all applicants, conditional licensees and licensees for stations required to be studied by § 21.902(c), thus depriving affected parties of notice and an opportunity to be heard. In *Edna Cornaggia*, 8 FCC Rcd 5442, 5444 (Dom. Fac. Div. 1993), the return of a modification application was upheld for failure to comply with § 21.902(g):

> The Commission makes provision for actual notice and an opportunity to be heard by parties in interest by requiring at Section 21.902(g) that microwave stations that might be affected by operation of an MDS station be served a copy of the required interference analysis for their station. Cornaggia admittedly failed to properly serve VisionAire with a copy of the interference analysis . . . . Due to this lack of service, the orderly process contemplated in the Commission's rulemaking order, in which the Commission staff resolves interference problems after oppositions are filed, was negated.

42. *Location Requirements.* The *1988 Public Notice* allows the filing of MDS applications on the E and F channels commencing April 20, 1988, *but only* for locations that are: (1) farther than 50 miles from any proposed location of an MMDS application pending on April 19, 1988 or an existing station; and (2) farther than 15 miles from the boundary of a statistical area for which there are applications

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[63] We have consistently required MDS applicants to comply with § 21.902(b). In the *Family Entertainment* case, we returned as unacceptable for filing an application which demonstrated that the level of interference was within 0.16 dB of meeting the 45 dB cochannel standard. In so doing, we stated that:

> [W]e reject FEN's claim that its applications should be granted because the level of interference . . . is *de minimis*. Section 21.902(b)(3) requires that an applicant demonstrate 45 dB of cochannel interference protection. In this rule provision, no reference is made to qualifying terms, degrees or levels, other than 45 dB at which interference would be deemed acceptable. 9 FCC Rcd at 568.

[64] *See, e.g., New Channels Communications, Inc.*, 57 Rad. Reg. 2d 1600, 1602 (1985) ("In our view, an MDS application which does not contain the important and essential technical showing required by § 21.902(c) cannot be characterized as complete, or in substantial compliance with the Commission's rules and regulations, as required by the criteria for acceptability outlined in rule § 21.20(a)."); *CNI Wireless, Inc.*, 9 FCC Rcd 2039, 2040 (Dom. Fac. Div. 1994) ("Section 21.902(c)(2) requires that an applicant initially file with the application analysis of the potential for harmful interference with any authorized or previously proposed adjacent channel stations within the radio horizon of the applicant's proposed transmitting antenna . . . . [B]ased upon CNI's failure to comply with Section 21.902, the Division's finding, that CNI's application was defective and unacceptable for filing, was proper."); *G.C. Cooper*, 8 FCC Rcd 7007, n.9 (Dom. Fac. Div. 1993) ("[T]he standard for evaluating applications under Part 21 of the rules is not substantial completeness' but rather acceptability for filing'. . . . Cooper's application was properly returned as unacceptable for filing . . . for failure to include the technical showing required . . . . "); *Marylan J. Benson*, 7 FCC Rcd 4668 (Dom. Fac. Div. 1992) ("[T]hose applications that do not contain an analysis of how the applicant intends to avoid cochannel interference in adjacent areas will not be considered acceptable . . . . This interference protection showing is a significant requirement . . . .")

pending on April 19, 1988 or an existing station. We explicitly stated in the first paragraph of the *Notice* that "[a]pplications filed must comply with the location restrictions contained in this Notice. We do not anticipate granting any waivers of this location requirement." *1988 Public Notice*, 3 FCC Rcd at 2661. We also emphasized twice that applications filed in violation of the location requirements would be returned as unacceptable for filing. *Id.* Despite these clear directives, virtually all of the above-referenced MMDS applications proposed a transmitter site in violation of the location restriction of the *1988 Public Notice*. Therefore, these applicants submitted applications on dates not designated by the Commission for filing of MDS applications.

43. Petitioners can claim no surprise concerning the important burden placed on applicants to carefully select the proposed location of an MDS station. In addition to the clear language in the *1988 Public Notice*, we stressed, as early as 1980, the importance of compliance with site selection requirements for MDS stations. In *R.L. Mohr*, 77 FCC 2d 30 (1980), we explained that "given the rather severe shortage of frequencies in these lower more desirable bands, . . . [t]o be able to use these frequencies [for MDS] imposes a cost, *a cost in terms of more careful engineering and site location*, and perhaps in use of more sophisticated equipment than would be otherwise required." *Id.* at 37 (emphasis added). Thus, petitioners had full notice of the necessity to comply with the location restrictions. Because petitioners chose to disregard the Commission's clear directive, their applications were properly returned as unacceptable for filing.

44. *Waiver Requests.* Although many of the returned applications did not include a waiver request, petitioners assert that the applications contained all necessary elements for grant of waivers of the location restrictions contained in the *1988 Public Notice*, and thus, the Commission was required to grant such waivers. Section 21.20(c)(1) states that a defective application may still be accepted for filing if the application is accompanied by a waiver request. However, because many of the returned applications were not accompanied by a request for waiver, these applicants failed to meet the requirements of this rule.[65] In addition, for the reasons discussed below, we do not find that grant of the waivers would serve the public interest, and thus will not grant a waiver on our own motion pursuant to § 21.20(c)(2).[66]

45. Section 21.19 provides that applications seeking waiver of the Commission's rules must contain a statement of reasons sufficient to justify a waiver. A waiver will only be granted upon an affirmative showing that:

> (a) The underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and that grant of the waiver is otherwise in the public interest; or
>
> (b) The unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.

"An applicant for waiver faces a high hurdle even at the starting gate. 'When an applicant seeks a waiver. . . it must plead with particularity the facts and circumstances which warrant such action.'" *Wait Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968) (per curiam)); *see also David Laustsen*, 3 FCC Rcd 2053, 2054 (Comm. Car. Bur. 1988) ("[A] request for waiver . . . must affirmatively demonstrate that application of the rules would frustrate the underlying purposes of the rule.")

46. Petitioners assert that they are entitled to a waiver of the *1988 Public Notice* location requirements because the applications identified all stations within 50 miles of the applicants' proposed stations, and, given the distance between those identified stations and the applicants' proposed stations, no "realistic possibility of harmful interference" exists. However, the Commission already has determined that the "mileage between [MDS] stations is not the only factor that determines whether interference will occur." *MDS Technical Order*, 98 FCC 2d at 90. In 1984, the Commission adopted, at 47 C.F.R. § 21.902(f), the definition of harmful interference as a free space calculation of a specified desired to undesired signal ratio. *See MDS Technical Order*, 98 FCC 2d at 89-90. As shown in Section III, *supra*, each of the returned applicants failed to submit interference studies, as required by § 21.902, for all authorized or previously proposed MMDS stations within 50 miles of their proposed transmitter sites, and to demonstrate that the proposed station would not cause harmful interference. Indeed, in some applications petitioners failed to even *identify* the existing or previously proposed stations. Thus, their assertion that there is "no realistic possibility of harmful interference" to other "existing or proposed stations is totally unsupported."[67] These wholly unsupported assertions fall far short of the stringent showing required by *WAIT Radio* of the existence of extraordinary or special circumstances justifying waiver.

47. Petitioners also assert, incorrectly, that the purpose of the location restrictions contained in the *1988 Public Notice* is "*solely* to avoid harmful interference." The location restrictions, however, serve other important administrative purposes which do not concern interference avoidance. The location restrictions also minimize the possibility for application gridlock, and allow us to process applications more expeditiously and to efficiently utilize scarce engineering resources. *See Boyd B. Hopkins, Sr.*, 9 FCC Rcd 569, 570 (Dom. Fac. Div. 1994); *R.L. Mohr*, 85 FCC 2d 596, 604 (1981). These purposes would not be served were we to routinely grant a waiver of the location restrictions to each and every applicant that demonstrated non-interference through the submission of interference studies. Thus,

[65] The applications filed for Grangeville, Idaho; Big Rapids, Michigan; Fergus Falls, Minnesota; Jal, New Mexico; Ridgeway, Pennsylvania; Warsaw, Virginia; and Portage, Wisconsin did not include waiver requests.

[66] The Commission may waive any rule or requirement on its own motion. *See* § 21.20(c)(2).

[67] A bald conclusion, without any offer of proof or documentary support, has no probative value in determining whether a proposed station would cause harmful interference. *Jim Bolton*, 2 FCC Rcd 3207 (Comm. Car. Bur. 1987).

we conclude that granting petitioners' requested waivers would frustrate the underlying purpose of the *1988 Public Notice* location restrictions.

48. We also reject petitioners' assertion that the *1988 Public Notice* contemplated that waivers of the 50 mile location requirement would be routinely granted whenever an MMDS applicant "demonstrate[s] non-interference." The *Notice* states that the Commission did not anticipate granting waivers of the location restrictions. Petitioners' reliance on a subsequent paraphrase of § 21.20, the rule governing acceptability for filing, and language in the *Notice* reminding applicants that they also must comply with the rules requiring the filing of interference studies for ITFS and MMDS authorized and proposed stations within 50 miles, as inviting applicants to file for waivers of the location requirement, is misplaced. The language referred to simply reminded interested parties that the imposition of additional location restrictions on post-1983 applicants did not exempt those applicants from the requirements to file both MMDS and ITFS interference studies, which were adopted in 1984 and are contained in §§ 21.901(d)(1), 21.902(i) and 21.902(c). *See MDS Technical Order*, 98 FCC 2d 68 (1984). This language did not explicitly or implicitly override the Commission's express warning that waivers of the location restrictions were not contemplated.

49. While petitioners cite *Austin Movie and Sports Cable, Inc.*, 4 FCC Rcd 6174 (Dom. Fac. Div. 1989), to support their position that the Commission should have granted a waiver of the location restrictions and accepted their applications for filing, that case is distinguishable from the instant case. In *Austin Movie*, the required interference analyses were filed with the application. The Commission granted the application, notwithstanding the potential for interference, based, in part, on the parties' stated willingness to comply with the § 21.902(a) mandate to resolve potential interference problems and on the imposition of several express conditions to ensure interference-free operation. *Id.* at 6176. Here, petitioners failed to submit the required analyses, and they have not presented any statements by previously proposed or authorized stations regarding their willingness to address potential interference problems. In addition, the application in *Austin Movie* was filed for Channel 2A, to which the *1988 Public Notice* is inapplicable. Thus, the additional consideration of whether the underlying purpose of the *Notice's* location restriction would be frustrated or whether there were any unique circumstances which would make the application of those restrictions unduly burdensome or unfair was not presented in that case. Petitioners also cite *Lawrence N. Brandt*, 7 FCC Rcd 4511 (Dom. Fac. Div. 1992), as supporting their waiver request. In *Brandt*, however, the applicant did not request a waiver and the decision does not discuss waiver issues. Instead, Brandt's filing was dismissed for failure to file interference studies pursuant to § 21.902. The decision specifically noted that due to Brandt's failure to include all required information concerning the potential for harmful interference, it was not necessary to address an affected party's argument that Brandt's filing also should be dismissed for failure to consider all previously filed MMDS applications within 50 miles. *Id.* at 4512.

50. Petitioners also claim that a waiver of the 50 mile location restrictions would be in the public interest because it would result in service to unserved communities, implying that the proposed communities can only be served from an MDS transmitter located within each community's borders.[68] We disagree. The Commission determined as early as 1973 that communities can be served, even when the transmitter is not located within the city limits of the specified community, by MDS stations located in nearby areas. In *Microband Corp. of America*, 41 FCC 2d 184 (1973), the Commission returned as unacceptable for filing an MDS application proposing a station at Newark, New Jersey as mutually exclusive and cut-off by a previously proposed New York City MDS application, despite the Newark applicant's claim that service to New Jersey would be precluded in violation of 47 U.S.C. § 307(b). In doing so we recognized that "the Newark-Elizabeth-Jersey City areas as a whole would be better served through a station located in New York City than through a . . . station located in Newark." *Id.* at 185-86.

51. Several Cullman petitioners also allege that they are entitled to a waiver because Exhibit E to their applications demonstrates that there is no reasonable alternative site from which they could provide acceptable service to Cullman, that is located more than 50 miles from the sites of previously proposed or existing stations. Exhibit E to the applications, however, does not discuss the lack of a reasonable alternative site. The only proof offered on that issue is the affidavit of petitioners' communications consultant, in which he asserts that "the fact that a waiver is being requested by the applicant is sufficient evidence that no other reasonable alternative exists as confirmed by our engineering contained in our original application." These unsubstantiated assertions that the proposed transmitter site was the only suitable site available are not enough. An applicant must affirmatively demonstrate a lack of a reasonable alternative site. *See Orange Park Florida TV, Inc. v. FCC*, 811 F.2d 664, 669 (D.C. Cir. 1987) (citations omitted) ("Commission precedent makes clear that an applicant seeking waiver of the minimum spacing rules must, as an initial matter, establish the nonavailability of fully-spaced sites . . . [Without such a showing, the applicant's] waiver request died, as it were, at the starting gate."). *See also Edna Cornaggia*, 8 FCC Rcd at 5444, n.6 ("Contrary to the assertion in the reconsideration petition that the Gary site . . . is the only possible site for this MMDS station, the [seven transmitter sites studied by the applicant] do not exhaust the numerous potential sites in the Chicago [CMSA] and its 15-mile buffer zone.").[69]

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[68] While petitioners assert that their proposed community of license is unserved and has various unmet needs, they offer no documentary support for these assertions. Thus, petitioners have failed to "plead with particularity the facts and circumstances" warranting a waiver. *WAIT Radio*, 418 F.2d at 1157.

[69] The Cullman petitioners further argue that the Commission was required to grant their waiver requests because the 50 mile location requirements were waived for two 1991 applications for new stations at Windom, Minnesota. The Windom situation, however, is not analogous. A review of Commission records reveals that the two file numbers provided by petitioners are not for new station applications. Instead, each is a certification of completion of construction, pursuant to authorization of a modification application, of a previously constructed station. No waiver requests were submitted, no waiver consideration was made, and consequently, there is no waiver ruling for comparison purposes here. To the extent our staff action on the Windom applications could somehow be construed as compel-

52. Petitioners failed to present justification as to why their applications merit treatment different from that which we applied to thousands of other post-1983 MMDS applications. In view of these considerations, we do not find it would be in the public interest to grant a waiver of the location restrictions in the *1988 Public Notice*. Therefore, we conclude that petitioners' requests for waivers of the location requirements were properly denied.

53. Petitioners assert that the staff's disposition of their waiver requests by "the mere checking of two paragraphs on a form returning the application in question" cannot, on its face, meet the court-imposed requirement to give a "hard look" to waiver requests. However, the Court in *WAIT Radio* made clear that:

> The agency is not bound to process in depth what are only generalized pleas, a requirement that would condemn it to divert resources of time and personnel to hollow claims. The applicant for waiver must articulate a specific pleading, and adduce concrete support, preferably documentary. Even when an applicant complies with these rigorous requirements, the agency is not required to author an essay for the disposition of each application.

418 F.2d at 1157, n.9. Here, most of the applications did not even include a waiver request. Where the application did request a waiver, the request was of a general nature and lacked concrete, documentary support. Under these circumstances, and in light of the thousands of applications the staff was processing, the return notification letters indicating that the request was denied as failing to comply with § 21.19 of the Commission's rules were sufficient. Moreover, we have now reviewed the staff's denial of petitioners' waiver requests and have fully explained the basis for denying those requests.

54. In addition, even if the *1988 Public Notice* location restrictions had not prohibited the filing of the above-referenced applications, in each instance these applications still would have been returned as unacceptable for filing due to violations of other Commission rules in effect at the time the returned applications were filed, including filing after the relevant cut-off date of mutually exclusive applications and failing to submit adequate interference analyses for authorized stations or applications.

55. Finally, we disagree with the petitioners' argument that we have changed the requirements, rules and standards applied to the returned applications and adopted more stringent separation standards *ex post facto* by refusing to grant the waivers and accept these applications for filing. As discussed at length above, the petitioners' applications were returned as unacceptable because they were filed after the relevant cut-off dates established in §§ 21.31 and 21.914 of the rules, and failed to submit and serve the required interference studies at the time the application was initially filed, as specified by § 21.902. *See Roundtree Communications*, 7 FCC Rcd 5456 (1992); *Boyd B. Hopkins, Sr.*, 9 FCC Rcd 569 (Dom. Fac. Div. 1994); *Edna Cornaggia*, 8 FCC Rcd 5442 (Dom. Fac. Div. 1993). All of the pertinent rules cited herein were long-established and applicable at the time the returned applications were filed.[70] All MDS applicants are charged with being familiar with Part 21 of the Commission's rules. Any applicant who "either ignores or fails to understand clear and valid rules of the Commission respecting the requirements for an application assumes the risk that the application will not be acceptable for filing." *Ranger v. FCC*, 294 F.2d 240, 242 (1961); *see also Donald E. Benson*, 8 FCC Rcd at 1873. Thus, we reject petitioners' claims that the Commission engaged in arbitrary and capricious action and find that "[t]he Division's return of [the above-referenced] applications . . . was not unreasonable or arbitrary, but rather was based on the [applicant's] failure to comply with Commission rules." *Family Entertainment*, 9 FCC Rcd at 568.

56. In view of all the foregoing considerations, we affirm the staff's return of the applications under consideration in this order. Reconsideration is not justified and reinstatement of the applications is not warranted.

57. Accordingly, IT IS ORDERED, that the untimely reconsideration petitions filed by the applicants and listed in n.55, *supra*, ARE HEREBY DISMISSED and the reconsideration petitions filed by the remaining above-referenced applicants ARE HEREBY DENIED.

58. IT IS FURTHER ORDERED, that the staff of the Mass Media Bureau shall send copies of the decision to the authorized representative for the petitioners by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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ling the grant of petitioners' waiver requests in the circumstances presented here, we decline to treat it as precedent. *See Family Entertainment*, 9 FCC Rcd at 568, n. 12.

[70] For example, the interference study filing rule was adopted in a 1974 rulemaking order (*MDS Allocation Order*, 45 FCC 2d 616 (1974)) and the initial cut-off provisions of § 21.31 were adopted in 1968. *See Applications for Common Carrier Facilities*, 13 FCC 2d 415 (1968).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

ROXTON INDEPENDENT SCHOOL DISTRICT Sumner, TX	File No. BPLIF-920713DJ
NORTHEAST TEXAS COMMUNITY COLLEGE Mount Pleasant, TX	File No. BPLIF-930416DN
MCCUISTION REGIONAL MEDICAL CENTER Paris, TX	File No. BPLIF-930416DM
ST MICHAEL HEALTH CARE CENTER Texarkana, TX	File No. BPLIF-930416EO
DURANT PUBLIC SCHOOLS Kenefic, OK	File No. BPLIF-921123DE

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels G1, G2, G3, and G4.

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1994; Released: December 19, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Roxton Independent School District (Roxton), Northeast Texas Community College (NTCC), McCuistion Regional Medical Center (McCuistion), St. Michael Health Care Center (St. Michael), and Durant Public Schools (Durant), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels G1-G4 in the areas of Summer, Mount Pleasant, Paris, and Texarkana, Texas, and Kenefic, OK, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Each applicant is qualified to be an ITFS licensee. Roxton and Durant are school systems, with the former being accredited by the Texas Education Agency and the latter being accredited by the Oklahoma State Department of Education. Both of these applicants propose to serve the formal educational needs of students enrolled in schools located both within and outside their jurisdictions. NTCC, accredited by the Southern Association of Colleges and Schools, is engaged in the formal education of its own enrolled students. McCuistion and St. Michael are non-profit organizations whose purposes are educational and include providing service to accredited schools and local medical facilities. McCuistion is accredited by the Joint Commission on the Accreditation of Healthcare Organizations. St. Michael is accredited by the Joint Commission of Accreditations of Hospitals. See 47 C.F.R. Section 74.932(a).

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per chan-

service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being local. Roxton and Durant are school systems serving the formal educational needs of schools within their own jurisdictions. NTCC is serving the formal educational needs of its enrolled students. McCuistion and St. Michael are providing ITFS service in the areas where their facilities are located.

Accreditation. Roxton, NTCC, and Durant are entitled to three points for accreditation. They are accredited by the Texas Education Agency, the Southern Association of Colleges and Schools, and the Oklahoma State Department of Education, respectively. With respect to McCuistion and St. Michael, the Commission has specifically held that hospitals and medical consortia do not qualify as accredited institutions for the purpose of receiving accreditation points. *Instructional Television Fixed Service-Reconsideration of Second Report and Order in MM Docket No. 83-523*, 59 RR 2d 1355, 1371 (1986). See also, *Mooreland Public Schools*, 9 FCC Rcd 527 (1994). Thus, McCuistion and St. Michael are not entitled to the three points for accreditation.

Four-Channel Limitation. No applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Roxton's illustrative schedule and programming grid propose an average of 24.375 hours of formal educational programming per channel per week. Thus, Roxton is entitled to one programming merit point. Because the illustrative schedules and programming grids submitted by the other applicants do not establish the threshold amount at which merit points are awarded, none of these applicants is entitled to any programming merit points.

The illustrative schedules and programming grids of McCuistion and St. Michael propose averages of only 9.25 hours of formal educational programming and 13.75 hours of other ITFS programming per channel per week. Similarly, NTCC's illustrative schedule and programming grid propose averages of only 9.25 hours of formal educational programming and 14.75 hours of other ITFS programming per channel per week. There are inconsistencies between the amounts of programming set forth in the illustrative schedule and programming grid of Durant. Using the lesser amounts specified, Durant is deemed to have proposed averages of 19.75 hours of formal educational programming and 13.375 hours of other ITFS programming per channel per week. Like McCuistion, St. Michael and NTCC, Durant is not entitled to any programming merit points.

E- and F- Channel Group Relocation. No applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, no applicant is entitled to the one point for such applicants.

Total. Roxton is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming, for a total of ten points. NTCC and Durant are entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation, for a total of nine points each. McCuistion and St. Michael are entitled to four points for being local and two points for observing the four-channel limitation, for a total of six points each. Thus, the selectee is Roxton. While the application of St. Michael is only directly mutually exclusive with the applications of McCuistion and NTCC, it is considered in the mutually exclusive group with Roxton since McCuistion and NTCC are directly mutually exclusive with Roxton. In view of our action denying the applications of McCuistion and NTCC, there is no longer any mutual exclusivity between Roxton and St. Michael, and the application filed by St. Michael also will be granted.

OTHER MATTERS

5. No determination has been made that the tower heights of three of the receive sites proposed by Roxton would not constitute a hazard to air navigation. Accordingly, any grant of a construction permit/license to Roxton will be appropriately conditioned.

6. Roxton and St. Michael propose to lease excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. Roxton has submitted a copy of its lease with RuralVision South, Inc., and St. Michael has submitted a copy of its lease with Wireless Communications, Inc. Both leases conform in all respects with our requirements. In addition, no petitions to deny or informal objections have been filed against either Roxton's application or that of St. Michael.

7. We find Roxton and St. Michael fully qualified to be ITFS licensees and conclude that grant of their applications would serve the public interest, convenience and necessity.

8. Accordingly, IT IS ORDERED, That the applications of Northeast Texas Community College (BPLIF-930416DN), McCuistion Regional Medical Center (BPLIF-930416DM), and Durant Public Schools (BPLIF-921123DE) ARE DENIED, and the applications of Roxton Independent School District (BPLIF-920713DJ) and St. Michael Health Care Center (BPLIF-930416EO) ARE GRANTED.

nel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

9. IT IS FURTHER ORDERED, That the authorization issued to Roxton Independent School District shall be conditioned as follows:

> This authorization is subject to the condition that construction of the receive towers at receive site locations R-9, R-10, and R-11 is prohibited until clearance is received from the Federal Aviation Administration, the Commission is so notified, and the appropriate painting and lighting specifications are determined.

10. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

OUACHITA ACADEMY OF ARTS AND SCIENCE
Rayville, Louisiana — File No. BPLIF-920309DA

NORTH LOUISIANA AREA HEALTH EDUCATION CENTER FOUNDATION
Holly Ridge, Louisiana — File No. BPLIF-930219DN

NORTHEAST LOUISIANA UNIVERSITY
Monroe, Louisiana — File No. BPLIF-930219DP

For Construction Permit and License in the Instructional Television Fixed Service on Channels B1-B4

MEMORANDUM OPINION AND ORDER

Adopted: November 28, 1994; Released: December 19, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Ouachita Academy of Arts and Science (Ouachita), North Louisiana Area Health Education Center Foundation (Health Education Center), and Northeast Louisiana University (NLU) for a construction permit and license on Channels B1-B4 in the Instructional Television Fixed Service (ITFS). Ouachita proposes to serve Rayville, Louisiana and surrounding areas. Health Education Center proposes to serve Holly Ridge, Louisiana and surrounding areas. NLU proposes to serve Monroe, Louisiana and surrounding areas.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). NLU is accredited by the Southern Association of Colleges and Schools and is applying to provide ITFS service to accredited parochial schools and a medical center in the Monroe, Louisiana area. Ouachita is accredited by the Accelerated Christian Education, a regional accrediting body, and is applying to provide ITFS service to accredited private and parochial schools in the Rayville and Monroe areas. Health Education Center is accredited by the Louisiana State University Medical Center and is applying to serve accredited hospitals and other medical facilities in the Holly Ridge area. The tree applicants are all local, and are therefore not required to establish a local programming committee. However, because none of the applicants proposes to serve its own students, each has submitted letters of intended use from the schools and other receive sites it proposes to serve.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Ouachita and Health Education Center are both entitled to four points because they are physically located within the jurisdictions they propose to serve. NLU is also entitled to four points because it is a university created by the state government for the purpose of serving the formal educational needs of students within the state of Louisiana.

Accreditation. Although both NLU and Ouachita propose to serve accredited institutions, a factor which satisfies their basic eligibility, neither applicant proposes to serve its own students, the factor necessary for earning merit points under the accreditation criterion. Therefore, neither NLU nor Ouachita is entitled to any points by this measure. See *Instructional Television Fixed Service - Second Report and Order Reconsidered in MM Docket No. 83-523, (Second Report and Order Recon.)*, 59 RR 2d 1355, 1370 (1986); and *Unified School District #511,* 8 FCC Rcd 7060, 7061 (1993). With respect to Health Education Center, the Commission has specifically held that hospitals and medical consortia do not qualify as accredited institutions for the purpose of receiving accreditation points. *Second Report and Order Recon.*, 59 RR 2d at 1371. See also, *Mooreland Public Schools,* 9 FCC Rcd 527, 527 (1994); *Milwaukee Regional Medical Instructional Television Station Inc.*, 2 FCC Rcd, 1472, 1473 (1987). Thus, Health Education Center is not entitled to three points for accredited applicants.

Four-Channel Limitation. None of the three applicants is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Ouachita's illustrative schedule proposes an average of 23.75 hours of formal educational and 37.25 hours of other ITFS programming per channel per channel week, while its grid proposes an average of 25 hours of formal and 36 hours of other ITFS programming per channel per week. Using either figure, Ouachita is entitled to two programming merit points. Health Education Center's illustrative schedule and its program grid both propose an average of 7.5 hours of formal educational and 12.5 hours of other ITFS programming per channel per week. Thus, Health Education Center is entitled to no programming merit points. NLU's illustrative schedule proposes an average of 7.5 hours of formal educational and 13.75 hours of the ITFS programming per channel per week, while its program grid proposes an average of 7.5 hours of formal educational and 12.5 hours of others ITFS programming per channel per week. Using either figure, NLU is entitled to no programming merit points.

E- and F- Channel Group Relocation. None of the applicants is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, none is entitled to one point for such applicants.

Total. Ouachita is entitled to four points for being local, two points for observing the four-channel limitation, and two points for proposing at least 61 hours of ITFS programming per week where at least 21 hours are formal, for a total of eight points. Health Education Center is entitled to four points for being local and two points for observing the four-channel limitation, for a total of six points. NLU is entitled to four points, for being local and two points for observing the four-channel limitation, for a total of six points. Thus, the tentative selectee is Ouachita.

OTHER MATTERS

5. Ouachita proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. Ouachita has submitted a copy of its lease with Cotton Country Cable, Inc., which conforms in all respects with the Commission's requirements for such leases.

6. No petitions to deny or informal objections have been filed against Ouachita fully qualified to be an ITFS licensee. We also conclude that grant of Ouachita's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the applications of North Louisiana area Health Educations Center Foundation (BPLIF-930219DN) and Northeast Louisiana University (BPLIF-930219DP) ARE DENIED, and the application of Ouachita Academy of Arts and Science (BPLIF-920309DA) IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 22, 1994

COMMON CARRIER BUREAU SOLICITS COMMENTS REGARDING MODIFICATIONS AND IMPROVEMENTS TO THE ANNUAL ACCESS TARIFF REVIEW PLANS

Comment Date: December 15, 1994

To aid our review of the required annual revisions of the local exchange carriers' (LECs') interstate access tariffs, the Common Carrier Bureau has developed Tariff Review Plans (TRPs). TRPs specify certain information that LECs must file in a uniform format. In each of the last eight years, the Bureau has prepared TRPs, after consultation with the LECs and their customers, reflecting both the specific information needed in light of changes in relevant Commission rules and policies and the most effective and least burdensome methods of supplying this information. The TRPs developed through this process are subject to approval by the Office of Management and Budget in accordance with the provisions of the Paperwork Reduction Act, 44 U.S.C. §§ 3506 et seq.[1]

In preparation for the 1995 annual access tariff filings, scheduled to be filed on March 31, 1995, the Bureau is examining changes in the TRPs necessary to reflect recent rule changes, other relevant events, and our experience in using TRPs. As we have in the past, the Bureau wishes to obtain the views and advice of carriers and other interested persons in order to develop any needed modifications and improvements in the TRPs. In order to adopt final TRPs as far in advance of the annual access tariffs filing date as possible, and to enable the TRPs to produce the information needed by the Commission to conduct its review of the tariffs in accordance with the Communications Act, the Bureau has determined that an expedited and informal procedure would be most useful. One rulemaking that may effect the price cap TRP for the 1995 filings regards the Price Cap Performance Review for LECs. Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, Notice of Proposed Rulemaking, 9 FCC Rcd 1687 (1994). However, parties should confine comments to the current price cap rules. There will be further opportunity for comment in the event that substantive changes in the TRP would be required as a result of the price cap performance review.

Interested persons wishing to express their views regarding modifications and improvements to the TRPs may do so by letter addressed to the Chief, Tariff Division, Common Carrier Bureau, Federal Communications Commission, 1919 M Street, N.W., Room 518, Washington, DC 20554. We invite comment on the form the TRPs should take both for carriers subject to price cap regulation and for carriers subject to the rate of return rules. We also invite comment from the price caps carriers on any exogenous changes they plan to request, beyond those included in the 1994 annual access tariff filings. These comments should be received no later than **December 15, 1994**, to allow the Bureau an opportunity to consider them. No reply comments will be considered.

Copies of comments may be obtained from International Transcription Service (ITS). The comments are also available for public inspection and copying in Room 518, 1919 M Street, N.W., Washington, DC 20554.

For further information, contact John Scott, Common Carrier Bureau, Tariff Division, at (202) 418-1528.

FEDERAL COMMUNICATIONS COMMISSION

[1] The 1994 TRPs, adopted in Commission Requirements for Cost Support Material to Be Filed with 1994 Annual Access Tariffs and for Other Cost Support Material, 9 FCC Rcd 1060 (1994), Order, bore OMB Approval Number 3060-0400.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West, Inc., and US West Communications, Inc. AAD 94-151

ORDER

Adopted: December 9, 1994; Released: December 12, 1994

By the Commission:

1. US West Communications, Inc., ("US West Communications") is an affiliate of US West, Inc. ("US West"). In 1991, US West sold a building to a non-affiliated third party.[1] Concurrent with this sale, US West Communications signed a 20.5 year agreement, beginning January 1, 1992, to lease approximately 1.3 million square feet of the building's office space. Commission auditors have been examining these transactions. To complete the audit, the Commission's staff requires the assistance of an expert appraiser to inspect and appraise the building and the terms of the lease.

2. On September 22, 1994, we issued to six independent appraisal firms a Request For Proposal to inspect and appraise the building and the terms of the lease.[2] Based upon the proposals submitted, we will select one appraiser. By this Memorandum Opinion and Order, pursuant to Section 220(f) of the Communications Act of 1934, as amended,[3] we authorize the release to the appraiser of any facts and information, currently known or subsequently learned by Commission staff, related to US West's sale of its building and the concurrent lease agreement involving its affiliate company, so that the appraiser may assist with the examination of these transactions. Pursuant to our decision here, the contract between the Commission and the appraiser shall contain a condition that prohibits the appraiser from divulging to anyone other than a member, officer or employee of the Commission, any facts or information learned during the course of the inspection and appraisal, except as directed by the Commission or a court.

3. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 220(f) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 220(f), that THE COMMISSION HEREBY AUTHORIZES DISCLOSURE SOLELY to an appraiser, to be selected pursuant to the Request For Proposal, any facts and information presently possessed or hereafter obtained by the Commission, related to US West's sale of its building at 1801 California Street in the Denver central business district in 1991 and the concurrent lease agreement involving its affiliate, US West Communications.

4. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 213(f), 215(a), 220(c) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 213(f), 215(a), 220(c), 403, that US West and US West Communications, upon request by Rudolph Bruno, Chief of the Common Carrier Bureau's New York Field Office, or his designee, shall supply the Commission with any facts and information related to US West's sale of its building and the concurrent lease agreement involving US West Communications, and that US West Communications shall afford the appraiser full access to the leased office space.

5. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 213(f), 215(a), 220(c) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 213(f), 215(a), 220(c), 403, that the contract between the Commission and the appraiser shall contain a clause requiring the appraiser to direct all requests related to the inspection and appraisal of US West's sale of its building and the concurrent lease agreement involving its affiliate, US West Communications, to Rudolph Bruno, Chief of the Common Carrier Bureau's New York Field Office, or his designee.

6. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 220(f) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 220(f), that the contract between the Commission and the appraiser shall contain a condition that prohibits the appraiser from divulging to anyone other than a member, officer or employee of the Commission any facts or information that may come to his or her knowledge during the course of the inspection and appraisal of US West's sale of the building and the concurrent lease agreement involving its affiliate, US West Communications, except as directed by the Commission or a court.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] The non-affiliated third party is Meridian Trust Company, as owner-trustee of Resources Capital Management Corporation.
[2] FCC Request For Proposal 94-44.
[3] 47 U.S.C. §220(f).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Friendly Bible Church, Inc. against Viacom Cable	CSR-4156-M
Request for Carriage	
Viacom Cable	CSR-4173-M
Petition for Special Relief	

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1994; Released: December 19, 1994

By the Chief, Cable Services Bureau:

1. On November 10, 1993, Friendly Bible Church, Inc. ["KLXV-TV"], licensee of Station KLXV-TV (Ind., Channel 65), San Jose, California, filed a complaint pursuant to §76.61 of the Commission's Rules against Viacom Cable ["Viacom"], operator of cable television systems serving San Francisco and East Bay, California, and neighboring communities, alleging that Viacom has failed to carry KLXV-TV on Viacom's systems. Viacom opposed KLXV-TV's complaint on December 9, 1993, and KLXV-TV replied on December 22, 1993.[1]

2. KLXV-TV's pleadings and supporting documents show that on July 8, 1993, following dissolution of a temporary restraining order issued in *Viacom International Inc. v. FCC*, No. C-93-1984-EFL (N.D. Cal. June 29, 1993), Viacom informed KLXV-TV and the Commission of Viacom's determination not to carry KLXV-TV. Viacom stated that this is because the station's programming, in Viacom's view, is substantially duplicative of that of Television Broadcast Station KFCB (Ind., Channel 42), Concord, California, and thus need not be carried, pursuant to §614(b)(5) of the Communications Act of 1934, as amended, and §76.56(b)(5) of the Commission's Rules. On July 12, 1993, KLXV-TV wrote Viacom requesting carriage. Viacom replied on August 12, 1993, rejecting KLXV-TV's request.

3. Our rules setting forth must-carry complaint procedures are quite clear. "No must-carry complaint filed pursuant to §76.61 will be accepted by the Commission if filed more than sixty (60) days after the . . . denial by a cable television system operator of a request for carriage . . . ."[2] KLXV-TV's complaint was filed on November 10, 1993, ninety days after Viacom's reply to KLXV-TV's July 12, 1993 request for carriage. Accordingly, KLXV-TV's complaint must be dismissed.

4. Accordingly, IT IS ORDERED, That the petition (CSR-4156-M) filed November 10, 1993, by Friendly Bible Church, Inc. IS DISMISSED as untimely filed.

5. IT IS FURTHER ORDERED, That the petition (CSR-4173-M) filed December 10, 1993, by Viacom Cable IS DISMISSED as moot.

6. These actions are taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] In addition, Viacom filed a petition for special relief, CSR-4173-M, on December 10, 1993, seeking a waiver of the Commission's definition of the term "substantially duplicates" in §76.56(b)(5) of the Commission's Rules, so as to free Viacom from any potential obligation to carry KLXV-TV. In view of our disposition today of KLXV-TV's complaint, Viacom's petition is moot.

[2] 47 C.F.R. §76.7(c)(4)(iii).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of CSR-4250-M
Kralowec Children's Family Trust
against Falcon Cable Systems Company

Request for Carriage and
Channel Positioning

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 19, 1994

By the Chief, Cable Services Bureau:

INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) became law.[1] On March 11, 1993, the Commission adopted a *Report and Order* to implement the mandatory broadcast signal carriage ("must-carry") provisions of the Cable Act.[2] Pursuant to the rules adopted in the *Report and Order*, cable systems were required to commence carriage of local broadcast stations entitled to must-carry status beginning June 2, 1993.[3] On June 17, 1993 local broadcast stations were required to make their initial election of either must-carry or retransmission consent status and notify cable systems of their election.[4] Those broadcast stations which elected must-carry status were required to notify the cable system of their preferred channel position at that time.[5]

SUMMARY OF PLEADINGS

2. The Kralowec Children's Family Trust is the license holder of KKAK-TV (KKAK). KKAK began operation on May 7, 1992 and its over-the-air channel position is 61. On April 16, 1993 KKAK notified Falcon Cable System Company (Falcon) that it wished to be carried pursuant to the must-carry provisions of the Cable Act and wished to be carried on channel 5. In June of 1993 Falcon complied with the must-carry request but placed KKAK on channel 16. On January 7, 1994 Falcon moved KKAK to channel 39. This move was without the complainant's consent.

3. Complainant makes several allegations. First, that it was moved from channel 16 to 39 without prior "direct" notice and without its consent, and that it is isolated from all other English-language broadcast stations. Second, that carriage of KKAK on channel 39 has degraded its signal quality and thus is in violation of section 614(b)(4)(A) of the Cable Act. Third, that the broadcaster's preference for channel position takes precedence over the operator's choice of position; thus Falcon is required to honor complainant's request that it be carried on channel 5.

4. Falcon responds that its relocation of KKAK from channel 16 to 39 was entirely appropriate; that complainant's allegation of signal degradation is incorrect and unfounded; and complainant has no right to demand carriage on either channel 16 or 39 give that, in this instance, Falcon has sole authority to place KKAK on a channel.

DISCUSSION

5. We first address KKAK's claim that it is entitled to be carried on channel 5. The Cable Act and our rules offer three channel options available to broadcast stations electing must-carry: 1) a station may elect to be carried on its over-the-air channel; or 2) on the channel on which it was carried on July 19, 1985; or 3) on the channel on which it was carried on January 1, 1992.[6] The rules also provide that a broadcast station may be carried "on such other channel as is mutually agreed upon by the station and the cable operator."[7] Given that KKAK began operating in May of 1992 and its over the air channel number exceeds the number of channels on Falcon's system, complainant has interpreted the language "on such other channel as is mutually agreed upon by the station and the cable operator" as constituting a fourth option that prevents Falcon from unilaterally deciding which channel complainant will occupy. KKAK also believes that where a broadcaster may not take advantage of these three statutorily designated channel options it may not be left to the cable operator to determine where to place the broadcaster.[8] We disagree with complainant's reading of our rules.

6. We read the 1992 Cable Act and the Commission's Rules to unambiguously state that there are three options -- not four -- available to a broadcaster.[9] The language which allows cable operators and broadcasters to mutually agree upon a different channel is the mechanism by which the two may reach a channel positioning option outside of the three proposed by the 1992 Cable Act's provisions. It is simply a way of saying that the parties have the flexibility to reach a result different from the three statutory options. It does not, however, mean that in the event the three options are not available the parties *must* agree on the ultimate placement of the channel. To read this flexibility as a mandatory fourth option would totally obviate the prior three options as broadcasters would clash with other

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).
[2] *Report and Order* in MM Docket 92-259, 8 FCC Rcd 2965 (1993). *See also, Clarification Order*, 58 FR 32449 (June 10, 1993).
[3] 47 C.F.R. § 76.56(a),(b).
[4] 47 C.F.R. § 76.64(f)(1).
[5] 47 C.F.R. § 76.57(d).
[6] 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(a).
[7] 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(c).
[8] KKAK believes that, for competitive reasons, Falcon has placed it on channel 39 ("as far away from the other English-language broadcast services as it could."). p. 14 of Petition for Special Relief. Complainant believes that our rules give KKAK's channel position preference precedence "over all but the cable operator's technical ability to comply." *Id.* at 15.
[9] *See Report and Order*, 8 FCC Rcd. at 2986. "The election of which of these three alternatives is left up to the station involved." "We also note that the 1992 Cable Act provides three channel positioning options for each commercial station and two for each NCE station, and also provides an opportunity for parties to develop their own solutions to conflicting claims." *Id.* at 2988.

broadcasters in seeking what they viewed as a more favorable channel position, leaving the cable operator in the position of having to choose between competing broadcasters.

7. In the present case, KKAK was initially carried by Falcon on channel 16 and subsequently moved to channel 39. Channel 61 is KKAK's over-the-air channel and KKAK was not in operation on either July 19, 1985 or January 1, 1992. Putting aside for the moment the question of whether KKAK was properly moved from channel 16 to channel 39, we find nothing improper with Falcon assignment of KKAK to either channel 16 or 39.

8. Second, we move to KKAK's claim that Falcon failed to properly notify KKAK of Falcon's intent to move complainant from channel 16 to channel 39. Section 76.58(a) of our rules states that "a cable operator shall provide written notice to any broadcast television station at least 30 days prior to either deleting from carriage or repositioning that station. Such notification shall also be provided to subscribers of the cable system." KKAK alleges that it was provided no "direct" notice. Falcon alleges that notification was provided in two ways: "First, a paid advertisement was placed in local newspapers notifying both the station and Falcon's cable customers that KKAK(TV) would be moving from channel 16 to channel 39 after January 6, 1994... Furthermore, the same information was put on the scroll of, and continuously carried on, Falcon's character generator channel for more than 30 days before the channel repositioning took place. As Mr. Kralowec, KKAK(TV)'s General Manager, is a Falcon subscriber, any attempt to claim that the station had no notice of the repositioning is simply disingenuous."[10]

9. With regard to adequate written notice, in a recent letter ruling we waived Section 76.964 and 76.309(c)(3)(i)(B) which would have required that subscribers and the local franchising authority be notified in writing of a change in the cable programming service tier offerings. This waiver was based on the fact that an operator wished to alter its channel lineup within a short period of time so that it could take advantage of our "going forward" rules.[11] Even though the waiver was granted, we still required written notices be sent to each subscriber.

10. Thus we conclude that, in this instance, a paid advertisement in a local newspaper is not sufficient written notice, particularly when that advertisement ran for only one day. We conclude as well that scrolling the notice on the cable system is not an adequate substitute for written notice. Although Falcon's notice was inadequate, we will not require that Falcon again rearrange its channel lineup because that would only lead to further subscriber dislocation and confusion. We will, however, separately consider imposition of a forfeiture for their apparent violation of the notification rule.

11. Finally, we agree with Falcon that KKAK has provided no proof to bolster its claim that Falcon has degraded complainant's signal.[12] KKAK has merely made a conclusory statement that its signal is being degraded. Absent any supplementing evidence we find that KKAK has failed to carry its burden with regard to this issue.

12. Accordingly, the petition filed on April 7, 1994, by The Kralowec Children's Family Trust IS DENIED, in accordance with Section 614(b)(6), (9) (47 U.S.C. § 534) of the Communications Act of 1934, as amended. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[10] Opposition to Petition for Special Relief, p.10-11.

[11] Letter from Meredith J. Jones, Chief, Cable Services Bureau, to Frederick Kuperberg, Vice President, Business and Legal Affairs, The Disney Channel, dated November 30, 1994.

[12] In its *Motion to Supplement Opposition to Petition for Special Relief* Falcon submitted a "proof-of-performance" test as evidence of its position. KKAK submitted statements from its engineer and several viewers as to its poor signal quality but provided no test data, i.e. time and date of test, equipment used, etc.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Mauivision	CSR-4302-M
K59EI	HI0036

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 19, 1994

By the Chief, Cable Services Bureau:

INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) became law.[1] On March 11, 1993 the Commission adopted a *Report and Order* to implement the mandatory broadcast signal carriage ("must-carry") provisions of the Cable Act.[2] Pursuant to the rules adopted in the *Report and Order*, cable systems were required to commence carriage of local broadcast stations entitled to must-carry status beginning June 2, 1993.[3] Our must-carry rules are also applicable to qualified low power television stations (LPTV).[4] On August 23, 1994 Susan Corrales Durch, licensee of LPTV Mauivision K59EI-Wailuku, Hawaii (K59EI) submitted the present complaint against Chronicle Publishing Company's Chronicle Cablevision (Chronicle) alleging the latter's improper denial of carriage. Chronicle responded on September 27, 1994 by alleging that the complaint was untimely filed and, that even if timely, complainant does not satisfy the definition of a qualified LPTV.

DISCUSSION

2. Our must-carry rules state that if there are not enough full-power local commercial television stations to fulfill the must-carry obligations of a cable system, a qualified LPTV may be carried.[5] One of the criteria for being a qualified LPTV is that there be "no full power television broadcast station licensed to any community within the county or other equivalent political subdivision (of a State) served by the cable system."[6] Chronicle correctly states that there are five (5) full-power local commercial broadcast stations licensed to Wailuku, Hawaii and, thus, complainant is not a qualified LPTV.[7]

3. Complainant, however, mistakenly identifies the five relevant stations as translators.[8] The five stations at issue are in fact full power commercial stations which, in this instance, are licensed to serve the same community as LPTV station K59EI, Wailuku, Hawaii. In its recently released reconsideration of its must-carry *Report and Order*, the Commission had an opportunity to address the same argument raised by the complainant. In the *Memorandum Opinion and Order*, one commenter urged the Commission to not accept a satellite station as a full-power station when the satellite station repeats another station's signal and is not broadcasting separate local programming. In rejecting this argument, we reiterated our earlier position that satellite stations meet the definition of a local commercial television station, and are full power stations pursuant to Section 614(h)(2)(F).[9]

Given our conclusion, we need not reach the other issues raised by the parties in this matter.

Accordingly, the petition filed on August 23, 1994, by Susan Corrales Durch, Mauivision K59EI-Wailuku IS DENIED, in accordance with Section 614(h)(2)(F) (47 U.S.C. 534) of the Communications Act of 1934. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith Jones
Chief, Cable Services Bureau

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Report and Order* in MM Docket 92-259, 8 FCC Rcd 2965 (1993). *See also Clarification Order*, 58 FR 32449 (June 10, 1993). 47 U.S.C. § 535. *Compare with Turner Broadcasting System, Inc. v. Federal Communications Commission*, ___S. Ct.___ (June 27, 1994) (remand of District Court opinion that must-carry provision of 1992 Cable Act is constitutional).

[3] 47 C.F.R. § 76.56(a),(b).

[4] 47 C.F.R. § 76.55(d); § 76.56(b)(3) and (4).

[5] 47 C.F.R. § 76.56(b)(3). Cable systems with 35 or fewer channels shall carry one (1) qualified LPTV, and systems with 35 or more channels shall carry two (2).

[6] 47 C.F.R. § 76.55(d)(6).

[7] The full-power stations are KAII-TV, KGMV, KMAU, KOGG, KWHM.

[8] Complainant's Reply to Respondent's Supplemental Opposition To Must Carry Complaint, p.3.

[9] *Memorandum Opinion and Order* in MM Docket 92-259 (adopted November 4, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Moran Communications, Inc. against Multimedia Cablevision, Inc.	CSR-4136-M NC0659

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1994; Released: December 19, 1994

By the Cable Services Bureau:

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) became law.[1] On March 11, 1993 the Commission adopted a *Report and Order* to implement the mandatory broadcast signal carriage ("must-carry") provisions of the Cable Act.[2] Pursuant to the rules adopted in the *Report and Order,* cable systems were required to commence carriage of local broadcast stations entitled to must-carry status beginning June 2, 1993.[3] Our must-carry rules are also applicable to qualified low power television stations (LPTV).[4] On October 14, 1993, Moran Communications, Inc. ("Moran"), licensee of low power television Station W20AT (Channel 20), Roanoke Rapids, North Carolina, submitted the present complaint against Multimedia Cablevision, Inc. ("Multimedia"), operator of a cable television system serving Scotland Neck, North Carolina, alleging the latter's improper denial of carriage. Multimedia responded on November 22, 1993 by alleging that the station did not provide a good quality signal and, that even if it did, complainant does not satisfy the definition of a qualified LPTV.

DISCUSSION

2. Our must-carry rules state that if there are not enough full-power local commercial television stations to fulfill the must-carry obligations of a cable system, a qualified LPTV may be carried.[5] One of the criteria for being a qualified LPTV is that there be "no full power television broadcast station licensed to any community within the county or other equivalent political subdivision (of a State) served by the cable system."[6] While Moran correctly states that there is one (1) full-power local commercial broadcast station[7] operating in Halifax County (the county in which it also operates), it mistakenly assumes that since that station is a satellite of another full-power station outside of the county,[8] it does not count with respect to the prohibition that no full-power station may be licensed to a community in the same county that a low-power station operates within.

3. In its recently released reconsideration of its must-carry *Report and Order,*[9] the Commission had an opportunity to address the same argument raised by the complainant. In the *Memorandum Opinion and Order,* one commenter urged the Commission not to accept a satellite station as a full-power station when the satellite station repeats another station's signal and is not broadcasting local programming. In rejecting this argument, we reiterated our earlier position that satellite stations meet the definition of a local commercial television station, and are full-power stations pursuant to §614(h)(2)(F). Given our conclusion, we need not reach the other issues raised by the parties in this matter.

4. Accordingly, the petition filed October 14, 1993, by Moran Communications, Inc., IS DENIED, pursuant to §614(h)(2)(F) (47 U.S.C. 534) of the Communications Act of 1934, as amended. This action is taken by the pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Report and Order in MM Docket No. 92-259,* 8 FCC Rcd 2965 (1993). *See also Clarification Order,* 58 FR 32449 (June 10, 1993). 47 U.S.C. §535. *Compare with Turner Broadcasting System, Inc. v. Federal Communications Commission,* ___S. Ct.___(June 27, 1994) (remand of District Court opinion that must-carry provision of 1992 Cable Act is constitutional).

[3] 47 C.F.R. §76.56(a),(b).

[4] 47 C.F.R. §76.55(d); §76.56(b)(3) and (4).

[5] 47 C.F.R. §76.56(b)(3). Cable systems with 35 or fewer channels shall carry one (1) qualified LPTV, and systems with 35 or more channels shall carry two (2).

[6] 47 C.F.R. §76.55(d)(6).

[7] The full-power station is WUNP-TV (Ind., Ch. 36), Roanoke Rapids, North Carolina.

[8] WUNP-TV is a satellite of Station WUNC-TV (Educ., Ch. 4), Chapel Hill, North Carolina.

[9] *Memorandum Opinion and Order in MM Docket No. 92-259,* adopted November 4, 1994).

DA 94-1176

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

October 7, 1994

Copies by Facsimile; Originals by U.S. Mail

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1801 Pennsylvania Ave., NW
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Stephen C. Garavito, Esq.
AT&T
295 N. Maple Ave.
Room 3235A3
Basking Ridge, NJ 07920

Released: October 7, 1994

RE: AT&T v. MCI Telecommunications Corp., File No. E-92-88S

Dear Counsellors:

This letter addresses MCI's September 12, 1994 motion to hold the damages phase of the above-referenced proceeding in abeyance pending action by the Commission on MCI's application for review of the Common Carrier Bureau's order finding MCI liable for violations of the Commission's international settlements policy.[1]

Based on our review of MCI's motion and AT&T's opposition, we believe that the public interest would best be served by holding this proceeding in abeyance pending Commission action on MCI's application for review. Therefore, we grant MCI's motion. This abeyance will avoid unnecessary expenditure of time and resources by the parties and this Commission if the Commission grants MCI's application for review. The rights of neither party are prejudiced by this action.

Please direct any questions to John B. Adams at (202) 418-0960.

---

1 American Telephone and Telegraph Company v. MCI Telecommunications Corp., 9 FCC Rcd 2688 (Com. Car. Bur. 1994).

This letter ruling is issued pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 208, and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291.

Sincerely,

Thomas D. Wyatt
Chief, Formal Complaints
and Investigations Branch,
Common Carrier Bureau

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DA 94-1177

October 7, 1994

Copies by Facsimile; Originals by U.S. Mail

Released: October 7, 1994

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RE: Beehive Telephone, Inc. and Beehive Telephone Nevada, Inc.v. The Bell Operating Companies, File No. E-94-57

Counselors:

This letter addresses the several discovery-related motions and pleadings filed in the above-referenced proceeding.[1] We address the

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[1] The motions and pleadings include: First Set of Interrogatories to the Bell Operating Companies filed June 22, 1994 (Beehive Interrogatories); Motion for Protective Order and to Hold Complaint in Abeyance filed July 22, 1994 (Abeyance

motions seriatim.

Initially, we note that defendants filed their abeyance motion in response to complainants' interrogatories rather than answering or objecting to each interrogatory as required by Section 1.729(b) of the Commission's rules, 47 C.F.R. § 1.729(b). Thus, in considering complainants' motion to compel, we do not have the benefit of the defendants specific objections to each interrogatory. We will require defendants' to answer the interrogatories or to state specific objections to each interrogatory within 20 days of the date of this letter. Defendants' answers and objections, if any, are to be filed with the Commission. Complainants will have an opportunity to renew their motion to compel following the filing of defendants' answers and objections.

We also note that defendants' failed to state a basis for their request for a protective order. Accordingly, we do not have a sufficient record upon which to render a considered judgment. Therefore, we direct the parties to engage in good-faith negotiations aimed at resolving defendants' confidentiality concerns with regard to the information requested in the interrogatories.

Defendants' arguments in favor of holding the instant proceeding in abeyance pending the outcome of the tariff investigation in CC Docket No. 93-129 are no more persuasive now than when we declined to grant a similar request made during the status conference held in this proceeding on July 12, 1994. We will deny defendants' motion to hold this proceeding in abeyance.

If you have questions regarding any of the foregoing, please contact John Adams at (202) 418-0960.

This letter ruling is issued pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 208, and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291.

Sincerely,

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Motion); Opposition to Motion for Protective Order and to Hold Complaint in Abeyance filed August 4, 1994 (Abeyance Opposition); Motion to Compel filed August 8, 1994; and Defendants' Opposition to Complainants' Motion to Compel filed August 22, 1994 (Opposition)(collectively, motions).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies Revisions to Tariff F.C.C. No. 4 — Transmittal Nos. 824 and 841

ORDER

Adopted: December 5, 1994; Released: December 5, 1994

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On September 30, 1994, the Ameritech Operating Companies (Ameritech) filed Transmittal No. 824 to revise its Tariff F.C.C. No. 4. Specifically, Ameritech proposes an in-band price cap rate restructure which would divide its existing interstate, intraLATA Message Telecommunications Services into three separate rate schedules: Commercial, Basic, and Operator-Assisted. Transmittal No. 824 Description and Justification (D&J) at 1. The transmittal is scheduled to become effective December 6, 1994.

2. On October 17, 1994, MCI Telecommunications Corporation (MCI) filed a petition to reject or suspend and investigate Transmittal 824, to which Ameritech replied on October 27. MCI contends that Ameritech's filing constitutes a new service, not a restructured service, because the language proposed in Transmittal 824 does not restrict the new Commercial rates to business customers. MCI argues that Ameritech's tariff gives business customers the option to choose between one pricing scheme or another, thus giving these customers a pricing option. According to MCI, pricing options are new services and Ameritech has not included sufficient cost data to support a new service offering. MCI Petition at 3-4.

3. In its reply, Ameritech maintains that its tariff filing is a service restructure and not a new service. According to Ameritech, the D&J filed with Transmittal 824 states that business customers will be moved to the Commercial rate schedule when the tariff becomes effective. Ameritech Reply at 2-3. To further clarify its petition, Ameritech subsequently filed Transmittal No. 841. That transmittal proposes an identical in-band price cap rate restructure to that proposed in Transmittal 824, but also contains tariff language restricting the new Commercial rate schedule to the lines of business end users, and the Basic rate schedule to lines of residential end users. Ameritech Tariff F.C.C. No. 4, Proposed Section 3.1(C)(1)(c)-(d), filed Nov. 22, 1994.

4. The Tariff Division has reviewed Ameritech's Transmittal Nos. 824 and 841 and the related pleadings. We conclude that Ameritech's filings are not patently unlawful so as to warrant rejection and that an investigation is not warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate Ameritech Operating Companies' revisions to Tariff F.C.C. No. 4, Transmittal No. 824, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BROOKRIDGE CABLE SPECIAL PURPOSE PARTNERSHIP II, PARENT COMPANY OF OF BROOKSHIRE CABLE TV, L.P.

Petition for Reconsideration

of the Certification of
Jefferson Township, Pennsylvania,
to Regulate Basic Cable Service Rates
(PA2869)

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1994; Released: December 5, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 22, 1993, Brookridge Cable Special Purpose Partnership II, parent company of Brookshire Cable TV, L.P., ("Brookridge") filed a timely petition for reconsideration challenging the certification of Jefferson Township, Pennsylvania, ("Jefferson") to regulate rates for basic cable service and associated equipment.[1] Jefferson opposes Brookshire's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[3] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[5] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[6]

II. DISCUSSION

3. In its petition, Brookridge states that its system serving Jefferson Township, Pennsylvania, its franchise area, is subject to effective competition because the system serves fewer than 30 percent of the homes within its franchise area.[7] Specifically, Brookridge states under penalty of perjury that it serves 419 subscribers in an area with 1,988 homes. Therefore, Brookridge argues, its system serves only 21 percent of the homes within the franchise area. As support Brookridge submits a declaration under penalty of perjury in which it states that it serves 419 subscribers in a township with 1,988 "Homes" according to the 1990 Census.

4. In opposition, Jefferson argues that Brookridge's calculation of the number of households is not in accordance with the Commission's Rules. Specifically, it argues that Brookridge incorrectly relied on the number of persons residing in each household, rather than the total number of households. Jefferson states that when the total number of households, (that is, occupied housing units) is used, Brookridge's penetration is actually 57 percent. As support, Jefferson submits a copy of the relevant page from the 1990 Census indicating that there are 1,988 persons in a household, but only 733 households, (that is, occupied housing units) within Jefferson Township.

5. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[8] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, exists in the franchise area.[9] Brookridge has failed to meet this burden. Specifically, Brookridge's claim is inappropriately based on the number of persons within a household. Our rules, however, require the use of data reflecting the number of "households" (i.e., occupied housing units) in the franchise area. *See Third Order on Reconsideration*, MM Docket Nos.

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[1] Jefferson filed its Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on October 20, 1993. Its certification became effective on November 19, 1993.

[2] 47 U.S.C. § 543(a)(4).

[3] *R P7jQ IXP* 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system. 47 C.F.R. § 76.905(a) and (b)(1).

[8] 47 C.F.R. § 76.906.

[9] 47 C.F.R. § 76.911(b)(1).

92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon Order"*).[10] According Brookridge's petition is denied.[11]

III. ORDERING CLAUSES

6. According, IT IS ORDERED that the petition for reconsideration filed by Brookridge Cable Special Purpose Partnership II, parent company of Brookshire Cable TV, L.P., challenging the certification of Jefferson Township, Pennsylvania, to regulate its basic cable service rates IS DENIED.

7. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

8. IT IS FURTHER ORDERED that Brookshire Cable Special Purpose Partnership II, parent company of Brookshire Cable TV, L.P., SHALL FILE the required rate justifications on the appropriate forms with Jefferson Township within 30 days from the release date of this *Memorandum Opinion and Order* or 30 days from the date of receipt of notice from Jefferson Township, Pennsylvania, that it is regulating rates, whichever is later.

9. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[10] As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra*. The term "household" is defined for purposes of the 1990 Census data to consist of housing units that are occupied. Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[11] We also note that Brookridge's declaration under penalty of perjury constitutes insufficient evidence to support its effective competition claim. The declaration in this case was purely conclusory and had a reference to the 1990 Census which did not explain the specific housing data used. Moreover, Brookridge submitted no documentary evidence to support its claim.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-168

In the Matter of

Codification of the Commission's
Political Programming Policies

MEMORANDUM OPINION AND ORDER

Adopted: October 28, 1994; Released: December 13, 1994

By the Commission: Commissioner Quello concurring in the result.

INTRODUCTION

1. The Commission has before it a Petition for Further Reconsideration or Clarification, dated July 22, 1992, filed on behalf of Cox Enterprises, Inc. and H & C Communications (the "Petitioners"). The Petitioners request that the Commission reconsider its decision, as stated in the *Memorandum Opinion and Order* in this docket, to treat paid Public Service Announcements (PSA's)[1] in the same manner as bonus spots for purposes of calculating the lowest unit charge (LUC) offered to candidates during the statutory pre-election periods.[2]

BACKGROUND

2. In our *Memorandum Opinion and Order*, we concluded that because paid PSA's, particularly those which run as 30-second spots, are of more than a *de minimis* value to commercial advertisers, they should be treated in the same manner as bonus spots when calculating the LUC for a class of time and time period.[3] Petitioners assert that, like billboards and program sponsorships, paid PSA's are of *de minimis* value to commercial advertisers. According to Petitioners, paid PSA's differ from institutional advertisements in that PSA's are not the message of the advertiser and the advertiser frequently has limited control over the content or schedule of the spot. As a result, they argue, advertisers and their agencies place little, if any, media value on paid PSA's.

3. The Petitioners argue that the benefit an advertiser receives from its identification in a 10-second billboard, or in a program sponsorship, is identical to the benefit received by an advertiser by its identification in a 30- or 60-second PSA.[4] Therefore, they contend, there is no basis for treating billboards and program sponsorships different than PSA's for purposes of calculating lowest unit charge.

4. Finally, Petitioners argue that our current policy will only discourage commercial support of local non-profit organizations and of issue-responsive programming, to the ultimate detriment of the public interest. Relatedly, they assert that our treatment of PSA's is inconsistent with our policy that permits stations to exclude from LUC bonus spots provided to non-commercial advertisers purchasing time on the station.

DISCUSSION

5. Section 315(b) of the Communications Act prohibits stations from charging candidates, during the 45 days preceding a primary election and the 60 days preceding a general election, more than the lowest unit charge of the station for the same class and amount of time in the same time period.[5] Our rules require that bonus spots be included in the calculation of lowest unit charge.[6] We continue to believe that PSA's provided to advertisers in connection with a paid schedule of time are of more than a *de minimis* value, and should be treated in the same manner as bonus spots when calculating LUC.

6. When a commercial advertiser purchases time on a station and receives, as part of the transaction, 30- or 60-second PSA's at no additional charge, those spots provide benefits indistinguishable from traditional bonus spots. We do not agree with Petitioners' assertion that the sponsorship identification required in such spots is analogous to a program sponsorship or a billboard. In the case of PSA's, the station has not simply provided the advertiser with a sponsorship identification tag, but has provided it with an entire 30- or 60-second spot. The identification is required by our rules precisely because the entire PSA has been paid for by a particular advertiser, and we consider the two parts inseparable. Program sponsorships and billboards, on the other hand, are typically spots of ten seconds or less, and are offered by the station as separate announcements that the station may place at its discretion. Thus, we will continue to consider them *de minimis*. Note, however, that

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[1] Paid PSA's are announcements promoting a charity or non-profit organization or event that are paid for, at least in part, by a commercial advertiser and are identified as paid for by the commercial advertiser. "Paid PSA's" may also include announcements paid for by candidates if the station has chosen to offer them to political advertisers.

[2] *Memorandum Opinion and Order*, 7 FCC Rcd 4611, 4617-18 (1992).

[3] This position was in contrast to our conclusion that billboards and program sponsorships are of *de minimis* value. Generally, billboards and program sponsorships are provided to advertisers who purchase spots in a particular program or daypart. Billboards, we noted, need not be calculated into LUC because they are not usually sold to advertisers, are typically shorter in duration than spot advertisements sold by stations, and often list a number of advertisers. Similarly, program sponsorships need not be calculated into LUC because they also are not usually sold to advertisers, are typically brief mentions, and often include a number of advertisers. We also determined that it would be impractical, if not impossible, to include the required political sponsorship identification in such brief mentions.

[4] In this regard, petitioners claim that the only identification of the sponsor in a PSA is generally the brief mention required by our sponsorship identification rules.

[5] 47 U.S.C. Section 315(b).

[6] 47 C.F.R. Section 73.1942 (a)(1)(xi).

if a station were to provide advertisers with 30- or 60-second program sponsorships, we would similarly treat them as bonus spots for LUC purposes.

7. We find no merit in Petitioners' argument that our current policy discourages commercial support of local non-profit organizations and of issue responsive programming.[7] We do not agree that our policy adversely affects an advertiser's decision to support alocal non-profit organization or program. The policy affects the rate which stations may charge political candidates; it does not diminish the benefit which advertisers derive from participating in non-profit promotion. Although broadcasters might be discouraged from providing commercial advertisers with PSA's at no charge, we see no reason why commercial advertisers themselves would be inhibited from donating time to local non-profit organizations. In addition, our ruling will have little effect where the PSA's are not given away to advertisers but are, in fact, purchased by them. For example, if a local advertiser pays a rate at LUC or higher for PSA's to promote a local non-profit organization or event, there would be no impact on LUC. If, however, in connection with a paid schedule, PSA's were provided to a commercial advertiser at no additional charge, those PSA's would be considered bonus spots for purposes of calculating LUC. Finally, nothing in our rules requires a broadcaster to include in its calculation of lowest unit charge PSA's that are not connected to a commercial transaction.

CONCLUSION

8. Based on the foregoing, we will not reverse our policy requiring station's to treat paid PSA's in the same manner as bonus spots when calculating the LUC for the same class and length of time in the same time period. Accordingly, IT IS ORDERED, that the Petition for Further Reconsideration for Clarification filed on behalf of Cox Enterprises, Inc. and H & C Communications IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[7] We believe our PSA policy is easily distinguishable from our policy permitting stations to give bonus spots to non-profit organizations without including such spots in LUC calculations. In the latter case, the benefit of the bonus spots goes only to the non-profit organization, and not to a combination of the non-profit organization and a commercial advertiser. The policy is intended to benefit only non-profit organizations. This is fully consistent with congressional intent to apply a "most favored *commercial* advertiser" standard for LUC purposes.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Report No. DS-1484 **Released: November 25, 1994**

NON-VOICE, NON-GEOSTATIONARY LOW EARTH ORBIT SATELLITES APPLICATIONS ACCEPTED FOR FILING

Seven applications have been filed in response to Public Notice, Report No. DS-1459, DA 94-1011 (released September 16, 1994), which established a cut-off date for a second round of Non-Voice, Non-Geostationary (NVNG) low earth orbit satellite systems ("Little LEOs"). The cut-off date was established after Leo One USA Corporation submitted an application for authority to construct, launch and operate a Little LEO satellite system.

Upon initial review, the Commission has found these applications acceptable for filing. The Commission reserves the right to return the applications, however, if it determines upon further review that they are defective or not in conformance with the Commission's rules, regulations or policies.

It also appears that the applications may be mutually exclusive on grounds of electrical interference. The processing of these applications is therefore considered to be a restricted adjudicative proceeding. *See* 47 C.F.R. § 1.1203. Accordingly, the restrictions on *ex parte* communications in Section 1.1223 of the rules, 47 C.F.R. § 1.1223, apply to these applications. Specifically, all *ex parte* contacts are prohibited with respect to these proposals. An *ex parte* contact is a message (spoken or written) concerning the merits or outcome of any aspect of this proceeding made to a Commissioner, a Commissioner's assistant or other decision-making staff member, other than comments officially filed at the Commission or oral presentations made with an opportunity for all parties to be present.

CTA Commercial Systems, Inc. **File No. 23-SAT-P/LA-95**

CTA Commercial Systems, Inc. (CTA) seeks authority to construct, launch and operate its "GEMnet" system of 38 satellites operating in the 148-150.5, 137-138, 400.15-401, 312-315 and 387-390 MHz frequency bands. The satellites will be launched into five orbital planes at an altitude of 1000 km; four inclined planes of eight satellites and one polar orbit of six satellites. The proposed GEMnet system will use FDMA/TDMA techniques to provide a variety of services including asset tracking and monitoring, utility meter reading, e-mail, paging and buoy/environmental sensor reading. CTA proposes use of a dynamic channel allocation scheme to share with other users of assigned frequency bands.

E-SAT, Inc. **File No. 24-SAT-P/LA-95**

E-SAT, Inc. has filed an application to construct, launch and operate six satellites in the NVNG service using the 149.0-150.0 and 137-138 MHz frequency bands. E-SAT proposes to operate its six satellites in a 100.7 degree inclined orbit at an altitude of 1261 km. The proposed E-SAT system will use CDMA/TDMA techniques to offer messaging services for the gas and electric utility industry, data messaging and retrieval in support of the direct-to-home broadcast satellite service, and messaging for environmental monitoring.

Final Analysis Communication Services, Inc. **File No. 25-SAT-P/LA-95**

Final Analysis Communication Services, Inc. (Final Analysis) has filed an application to construct, launch and operate an NVNG satellite system with a constellation of 26 satellites to be operated in the 137-138 MHz, 148-150 and 400-401 MHz frequency bands. The proposed constellation will consist of four planes of six satellites inclined at 66^0 and two planes of one satellite inclined at 82^0. Each plane will have a nominal altitude of 1000 km. Final Analysis proposes to provide a variety of NVNG services including remote monitoring, tracking, location determination, data acquisition, non-voice messaging and emergency communications/distress signalling. They propose to a TDMA/FDMA strategy and a Scanning Activity Receiver System to scan for available channels to maximize frequency use while collecting data.

GE American Communications, Inc. **File No. 26-SAT-P/LA-95**

GE American Communications, Inc. (GE Americom) has filed an application to construct, launch and operate 24 satellites in the NVNG satellite service with an exclusive assignment of 72 kHz and non-exclusive assignment of 204 kHz of the 148-150.05 MHz frequency band for uplinks and exclusive assignment of 146 kHz in the 399.9-400.05 MHz frequency band for downlinks and has requested a waiver for this use of the 399.9-400.05 MHz band. Should the waiver be denied, GE Americom seeks exclusive assignment of an alternative 146 kHz elsewhere in the NVNG band. The proposed FDMA/TDMA system would complement GE Americom's existing data communications services by providing geopositioning and messaging and data relay services for the shipping industry, mobile services to the trucking industry, remote communications for the gas and oil industry and could meet the communications requirements of local, state and federal governments. The 24 satellite constellation will be distributed into four orbital planes with six satellites per plan, at an inclination of 98^0 and an orbital altitude of 800 km.

Leo One USA Corporation **File No. 27-SAT-AMEND-95**

Leo One USA Corporation (Leo One) has filed an amendment to its pending second round application (File No. 57-DSS-P/LA-94 (48)) to construct, launch and operate 48 NVNG satellites in the 137-138 and 148-150.05 MHz bands. By this amendment, Leo One proposes to increase the number of orbital planes of its system from four to eight, reduce the number of satellites per plane from

twelve to six, eliminate the use of intersatellite links, review the frequencies in the 137-138 MHz band, and update its milestone chart.

Orbital Communications Corporation **File No. 28-SAT-MP/ML-95**

Orbital Communications Corporation (Orbcomm) has filed an application for modification of its license. *See Orbital Communications Corporation,* FCC 94-268 (released October 27, 1994). Orbcomm proposes (1) to migrate its 50 kHz gateway-to-satellite link into the Transit band (149.9-150.05 MHz) and to use that band for subscriber uplinks after January 1, 1997; and (2) to add twelve satellites to its constellation of 36 satellites, which will increase its spectrum requirements by 90 kHz in the 137-138 MHz band.

Volunteers In Technical Assistance **File No. 29-SAT-AMEND-95**

Volunteers in Technical Assistance (VITA) has filed a further amendment to its pending first round Little LEO application (File No. File No. CSS-91-007(3)). VITA seeks (1) authority to construct, launch and operate a third satellite and (2) access to the 148-150.05, 137-138, and 400.15-401 MHz bands.

* * *

Comments or petitions on the foregoing applications and modification may be filed on or before **January 25, 1995**. Replies and oppositions may be filed on or before **February 24, 1995**. Responses may be filed on or before **March 14, 1995**.

All applications will be available for public inspection in the Public Reference Room at 2025 M Street, N.W., Room 6220, Washington, D.C. during its normal operating hours. Copies of these documents may be obtained from ITS, Inc., 2100 M Street, NW, Suite 140, Washington, D.C. 20037, (202) 857-3800. For further information, contact Kathleen Campbell at (202) 634-1624.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

KINGSVILLE INDEPENDENT SCHOOL DISTRICT
Falfurrias, Texas — File No. BPLIF-930219DU

PREMONT INDEPENDENT SCHOOL DISTRICT
Benavides, Texas — File No. BPLIF-920402DE

For Construction Permit and License in the Instructional Television Fixed Service on Channels C1-C4.

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1994; Released: December 20, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Kingsville Independent School District (Kingsville) and Premont Independent School District (Premont), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels C1-C4 in the areas of Falfurrias and Benavides, Texas, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Both are school districts that are accredited by the Texas Education Agency and that propose to serve the formal educational needs of students enrolled in schools located within and outside their jurisdictions.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Both applicants are entitled to four points because they are school districts that propose to offer ITFS programming to serve students in schools located within their jurisdictions.

Accreditation. Both applicants are entitled to three points for being accredited by the Texas Education Agency.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and programming "grid." Where the amounts and types of programming proposed in

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

the schedule and in the grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Of its proposed weekly total of 40 hours per channel, Kingsville sets forth in its illustrative schedule an average of 27.125 hours of ITFS programming per channel per week, all of which is to be formal educational programming. However, Kingsville's programming grid proposes an average of 27.25 hours of formal educational programming. Using the lesser figure, Kingsville is entitled to one programming merit point. Both Premont's illustrative schedule and programming grid propose an average of 24.375 hours of formal educational ITFS programming per channel per week and zero hours of other ITFS programming per channel per week. Consequently, Premont is also entitled to one programming merit point.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such appplicants.

Total. Both applicants are entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. Because the applicants are tied, we must utilize our tie-breaker mechanism to determine the winning applicant.

TIE-BREAKER MECHANISM

5. When the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service - Third Report and Order in MM Docket No. 83-523, (Third Report and Order)*, 4 FCC Rcd 4830 (1989); *Third Report and Order Reconsidered*, 5 FCC Rcd 945 (1990); and 47 C.F.R. Section 74.913(d). This mechanism is based upon the submission by each applicant of the number of students at its proposed receive sites who are formally enrolled in classes for credit toward an academic degree or diploma or a legally required certification or license.[3] Each applicant then has 15 days to respond to any aspect of the enrollment submissions. Once this response period has expired, the Commission compares the figures to determine if any applicant's system reaches less than 80 percent as many students as another applicant's. If so, the application resulting in service to the fewer number of students is denied, and the remaining application is granted. If more than one applicant remains, the channels or channel capacity are evenly divided among the remaining applicants. Because the applicants here did not reach an agreement regarding the use of the channels, we look to the enrollment figures submitted by each.

6. Kingsville has provided documentation showing that a total of 6,614 students will be served at its receive sites. Premont has submitted a letter indicating that 6,224 students will be served at its receive sites, but the necessary letters of intended use from those receive sites outside its jurisdiction were not submitted prior to the "B" cut-off date of June 11, 1993. In addition, most of those letters lacked the specificity required by the Commission's rules. Consequently, Premont can be credited only with 971 students, the number enrolled in the schools within its jurisdiction. Because the number of students credited to Premont, 971, is less than 80 percent of the number of students credited to Kingsville, 6,614, Kingsville will be authorized to operate facilities on Channels C1-C4 and the application of Premont will be denied.

OTHER MATTERS

7. Kingsville proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with Ultra Vision of Texas, Inc., which conforms in all respects with our requirements. In addition, no petitions to deny or informal objections have been filed against Kingsville's application.

8. We find Kingsville fully qualified to be an ITFS licensee and conclude that grant of Kingsville's application would serve the public interest, convenience and necessity.

9. Accordingly, IT IS ORDERED, That the application of Premont Independent School District (BPLIF-920402DE) IS DENIED, and the application of Kingsville Independent School District (BPLIF-930219DU) IS GRANTED.

10. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[3] Only receive sites specified as of the "B" cut-off date may be used in determining the number of students served. *Third Report and Order Recon., supra*. Moreover, applicants serving students other than their own must have submitted letters, also by the "B" cut-off date, from those receive sites indicating an intention to use the proposed service. 47 C.F.R. Section 74.911(c); *Third Report and Order*, 4 FCC Rcd at 4832. Specifically, those letters, to be signed by the administrator or authority responsible for curriculum planning, must indicate that the applicant's programming offerings have been viewed and that such programming will be incorporated in the sites' curricula. Further, the letters should discuss the types and amounts of programming expected to be used and indicate the extent to which representatives from the various sites will participate in the planning, scheduling, and production of the programming. 47 C.F.R. Section 74.932, Note 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

GEORGE WEST INDEPENDENT SCHOOL DISTRICT
George West, Texas — File No. BPLIF-930219DR

ORANGE GROVE INDEPENDENT SCHOOL DISTRICT
Benavides, Texas — File No. BPLIF-920402DJ

For Construction Permit and License in the Instructional Television Fixed Service on Channels A1-A4.

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1994; Released: December 20, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of George West Independent School District (George West) and Orange Grove Independent School District (Orange Grove), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels A1-A4 in the areas of George West and Benavides, Texas, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Both are school districts that are accredited by the Texas Education Agency and that propose to serve the formal educational needs of students enrolled in schools located within and outside their jurisdictions.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is theapplicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Both applicants are entitled to four points because they are school districts that propose to offer ITFS programming to serve students in schools located within their jurisdictions.

Accreditation. Both applicants are entitled to three points for being accredited by the Texas Education Agency.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and programming "grid." George West's illustrative schedule and programming grid propose an average of 23.875 hours of ITFS programming per channel per week, all of which is to be formal educational programming. Likewise, Orange Grove's illustrative

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

schedule and programming grid propose an average of 24.375 hours of ITFS programming per channel per week, all of which is to be formal educational programming. Consequently, George West and Orange Grove are entitled to one programming merit point apiece.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. Both applicants are entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. Because the applicants are tied, we must utilize our tie-breaker mechanism to determine the winning applicant.

TIE-BREAKER MECHANISM

5. When the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service - Third Report and Order in MM Docket No. 83-523,* (*Third Report and Order*), 4 FCC Rcd 4830 (1989); *Third Report and Order Reconsidered*, 5 FCC Rcd 945 (1990); and 47 C.F.R. Section 74.913(d). This mechanism is based upon the submission by each applicant of the number of students at its proposed receive sites who are formally enrolled in classes for credit toward an academic degree or diploma or a legally required certification or license.[3] Each applicant then has 15 days to respond to any aspect of the enrollment submissions. Once this response period has expired, the Commission compares the figures to determine if any applicant's system reaches less than 80 percent as many students as another applicant's. If so, the application resulting in service to the fewer number of students is denied, and the remaining application is granted. If more than one applicant remains, the channels or channel capacity are evenly divided among the remaining applicants. Because the applicants here did not reach an agreement regarding the use of the channels, we look to the enrollment figures submitted by each.

6. George West has provided documentation showing that a total of 4,342 students will be served at its receive sites. Orange Grove has submitted a letter indicating that 6,212 students will be served at its receive sites, but the necessary letters of intended use from those receive sites outside its jurisdiction were not submitted prior to the "B" cut-off date of June 11, 1993. Consequently, Orange Grove can be credited only with 1,297 students, the number enrolled in the schools within its jurisdiction. Because the number of students credited to Orange Grove, 1,297, is less than 80 percent of the number of students credited to George West, 4,342, George West will be authorized to operate facilities on Channels A1-A4 and the application of Orange Grove will be denied.

OTHER MATTERS

7. George West proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with Ultra Vision of Texas, Inc., which conforms in all respects with our requirements. In addition, no petitions to deny or informal objections have been filed against George West's application.

8. We find George West fully qualified to be an ITFS licensee and conclude that grant of George West's application would serve the public interest, convenience and necessity.

9. Accordingly, IT IS ORDERED, That the application of Orange Grove Independent School District (BPLIF-920402DJ) IS DENIED, and the application of George West Independent School District (BPLIF-930219DR) IS GRANTED.

10. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[3] Only receive sites specified as of the "B" cut-off date may be used in determining the number of students served. *Third Report and Order Recon., supra*. Moreover, applicants serving students other than their own must have submitted letters, also by the "B" cut-off date, from those receive sites indicating an intention to use the proposed service. 47 C.F.R. Section 74.911(c); *Third Report and Order*, 4 FCC Rcd at 4832. Specifically, those letters, to be signed by the administrator or authority responsible for curriculum planning, must indicate that the applicant's programming offerings have been viewed and that such programming will be incorporated in the sites' curricula. Further, the letters should discuss the types and amounts of programming expected to be used and indicate the extent to which representatives from the various sites will participate in the planning, scheduling, and production of the programming. 47 C.F.R. Section 74.932, Note 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

HARLEM CONSOLIDATED SCHOOL DISTRICT #122
Rockford, Illinois — File No. BPLIF-920610DA

BELVIDERE COMMUNITY UNIT SCHOOL DISTRICT #100
Rockford, Illinois — File No. BPLIF-920817DA

For Construction Permit and License in the Instructional Television Fixed Service on Channels D1-D4

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1994; Released: December 20, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Harlem Consolidated School District #122 (Harlem) and Belvidere Community Unit School District #100 (Belvidere), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels D1-D4 in the area of Rockford, Illinois.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Both Harlem and Belvidere are school districts that are accredited by the Illinois State Board of Education and that are applying to provide ITFS service to students enrolled at schools within their jurisdictions.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F Channellicensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Harlem and Belvidere are both entitled to four points because they are school districts that propose to serve the formal educational needs of students enrolled at schools located within their jurisdictions.

Accreditation. Both applicants are entitled to three points because they are accredited by the Illinois State Board of Education. Harlem is also accredited by the North Central Association of Colleges and Schools.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

which result in the least number of points to the applicant, so long as the excess lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992). Harlem's illustrative schedule and programming grid proposes an average of 41 hours of formal educational programming per channel per week. Thus, Harlem is entitled to two programming merit points. Belvidere also proposes an average of 41 hours of formal educational programming and zero hours of other ITFS programming per channel per week in both its illustrative schedule and programming grid. However, Belvidere's lease agreement only allows for 40 hours of such programming. Consequently, Belvidere is entitled to only one programming merit point.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to one point for such applicants.

Total. Belvidere is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 average hours of formal educational programming per channel per week, for a total of ten points. Harlem is entitled to four points for being local and three points for being accredited, two points for observing the four-channel limitation, and two points for proposing at least 41 average hours of formal educational programming per channel per week, for a total of eleven points. Thus, Harlem is the tentative selectee.

OTHER MATTERS

5. Harlem proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with United States Wireless Cable, Inc. (U.S. Wireless), which does not conform in all respects with our requirements. Specifically, the lease provides that if Harlem terminates its ITFS activities, it is required to assign its Commission authorizations and related applications to "any FCC qualified entity designated by [U.S. Wireless]." We believe that such an open-ended provision unduly intrudes in an area that has been the sole province of the licensee. See *Second Report and Order*, 101 FCC 2d at 90-91; accord, *East Bernard Independent School District*, 8 FCC Rcd 4000, 4001 (1993). Although inconsistent with our requirements for excess capacity leases, this provision neither reflects on the applicant's basic or comparative qualifications, nor precludes grant of an authorization. See *Van Vleck Independent School District*, 7 FCC Rcd 7231, 7233 (1992). Accordingly, Harlem's authorization will be conditioned upon conformity of the lease to Commission requirements.

6. No petitions to deny or informal objections have been filed against Harlem fully qualified to be an ITFS licensee. We also conclude that grant of Harlem's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Belvidere Community Unit School District #100 (BPLIF-920817DA) IS DENIED, and the application of Harlem Consolidated School District #122 (BPLIF-920610DA) IS GRANTED, subject to the condition that within 30 days of the release of this Order, Harlem shall submit to the Chief, Distribution Services Branch for approval, information demonstrating compliance with Commission requirements, including, if appropriate, an amended lease agreement conforming in the manner discussed herein.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CANISTOTA PUBLIC SCHOOLS
Montrose, S.D. FILE NO. BPLIF-92O320DE

RUTLAND SCHOOL DISTRICT
Colman, S.D. FILE NO. BPLIF-930219DQ

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels A1-A4

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1994; Released: December 20, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Canistota Public Schools (Canistota) and Rutland School District (Rutland), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels A1-A4 in the areas of Canistota and Colman, South Dakota, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Both are school districts that are accredited by the South Dakota State Board of Education and that propose to serve the formal educational needs of students enrolled in schools located within their jurisdictions.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels in the same area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Both applicants are entitled to four points because they are school districts that propose to offer ITFS programming to serve students in schools located within their jurisdictions.

Accreditation. Both applicants are entitled to three points for being accredited by the South Dakota State Board of Education.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS program- ming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Canistota's illustrative schedule and programming grid propose an average of 24.375 hours of formal educational and zero hours of other ITFS programming per channel per week. Thus, Canistota is entitled to one programming merit point. In contrast, Rutland proposes in its programming grid an average of 21 hours of formal educational and zero hours of other ITFS programming per channel per week. However, Rutland's illustrative schedule proposes only an average of 16 hours of formal educational programming per channel per week, with an additional average of five hours per channel per week being devoted to other ITFS programming. Since the lesser amount of formal educational programming specified in the illustrative schedule does not reach the threshold amount at which merit points are awarded, Rutland is entitled to no programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. Canistota is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal ITFS programming per channel per week, for a total of ten points. Rutland is entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation, for a total of nine points. Thus, the tentative selectee is Canistota.

OTHER MATTERS

5. Canistota proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with RuralVision Central, Inc., which conforms in all respects with our requirements. In addition, no petitions to deny or informal objections have been filed against Canistota's application.

6. We find Canistota fully qualified to be an ITFS licensee and conclude that grant of Canistota's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Rutland School District (BPLIF-930219DQ) IS DENIED, and the application of Canistota Public Schools (BPLIF-920320DE) IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

BACONE COLLEGE FILE NO. BPLIF-930416EA
Warner, Oklahoma

FT. GIBSON SCHOOLS FILE NO. BPLIF-920713DB
Warner, Oklahoma

For Construction Permit and License in the Instructional Television Fixed Service on Channels C1-C4

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1994; Released: December 20, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Bacone College (Bacone) and Ft. Gibson Schools (Ft. Gibson), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels C1-C4 in the Warner, Oklahoma area.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Bacone is accredited by the Oklahoma State Board of Regents and is applying to serve its own students. Ft. Gibson is a school district accredited by the Oklahoma State Department of Education and is applying to serve students enrolled at schools within its jurisdiction.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate to another ITFS channel group, where such applicants show an established needfor an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Both applicants are entitled to four points. Bacone is an educational institution that proposes to serve the formal educational needs of its own students, while Ft. Gibson is a school district that proposes to serve the educational needs of students enrolled at schools within its jurisdiction.

Accreditation. Each applicant is entitled to three points under this criterion. Bacone is accredited by the Oklahoma State Board of Regents, whereas Ft. Gibson is accredited by the Oklahoma State Department of Education.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Ft. Gibson's illustrative schedule and programming grid propose an average of 24.375 hours of ITFS programming per channel per week, all of which is to be formal educational programming. Consequently, Ft. Gibson is entitled to one programming merit point. In contrast, both Bacone's illustrative schedule and programming grid propose an average of only 20.5 hours of formal educational programming per channel per week. Because the amount of programming

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

proposed does not reach the threshold amount at which merit points are awarded, Bacone is not entitled to any programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. Ft. Gibson is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. Bacone is entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation, for a total of nine points. Thus, the tentative selectee is Ft. Gibson.

OTHER MATTERS

5. Ft. Gibson proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with Rural Vision Central, Inc., which conforms in all respects with our requirements.

6. No petitions to deny or informal objections have been filed against Ft. Gibson's application, and we find Ft. Gibson fully qualified to be an ITFS licensee. We also conclude that grant of Ft. Gibson's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Bacone College (BPLIF-930416EA) IS DENIED, and the application of Ft. Gibson Schools (BPLIF-920713DB) IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

GATEWAY CHRISTIAN SCHOOL
Carlsbad, New Mexico — File No. BPLIF-920603DL

SHEKINAH NETWORK
Carlsbad, New Mexico — File No. BPLIF-930416EC

For Construction Permit and License in the Instructional Television Fixed Service on Channels D1-D4

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1994; Released: December 20, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Gateway Christian School (Gateway) and Shekinah Network (Shekinah), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels D1-D4 in the area of Carlsbad, New Mexico.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Since Gateway is located in Roswell, New Mexico, which is approximately 70 miles from Carlsbad, and since Shekinah is a nonprofit educational organization that is located in Atascadero, California, each applicant has submitted the requisite letters of intended use from accredited schools that will use its service and has demonstrated the establishment of local programming committees.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants whichare existing E or F Channel licensees seeking to relocate to another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Neither Gateway nor Shekinah is entitled to any points under this measure because neither applicant is located in the area it proposes to serve.

Accreditation. Although Gateway and Shekinah propose to serve accredited institutions, a factor satisfying their basic eligibility, neither applicant is an accredited entity in its own right in the area it proposes to serve, the status necessary for earning merit points under the accreditation criterion. Therefore, neither applicant is entitled to any points under this measure. See *Instructional Television Fixed Service - Second Report and Order Reconsidered in MM Docket No. 83-523*, 59 RR 2d 1355, 1370 (1986); and *Northern Arizona University Foundation*, 9 FCC Rcd 1549 (1994).

Four-Channel Limitation. Neither applicant is the current licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and programming "grid." Where the amounts and types of programming proposed in

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

the schedule and in the grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Shekinah's grid proposes an average of 25.875 hours of ITFS programming per channel per week, 21.25 hours of which is to be formal educational programming. Its illustrative schedule, however, proposes an average of 21.25 hours of formal educational programming per channel per week, although a total of 26.5 hours of ITFS programming is proposed. Notwithstanding this inconsistency, Shekinah is entitled to one programming merit point. Both Gateway's illustrative schedule and programming grid propose 24.375 hours of ITFS programming per channel per week, all of which is to be formal educational programming. Therefore, Gateway is also entitled to one programming merit point.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. Both Gateway and Shekinah are entitled to two points for observing the four-channel limitation and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of three points each. Because Gateway and Shekinah are tied, we must utilize our tie-breaker mechanism to determine the winning applicant.

TIE-BREAKER MECHANISM

5. When the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of the channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service - Third Report and Order in MM Docket No. 83-523, (Third Report and Order)*, 4 FCC Rcd 4830 (1989); *Third Report and Order Reconsidered*, 5 FCC Rcd 945 (1990); and 47 C.F.R. Section 74.913(d). This mechanism is based upon the submission by each applicant of the number of students at its proposed receive sites who are formally enrolled in classes for credit toward an academic degree or diploma or a legally required certification or license.[3] Each applicant then has 15 days to respond to any aspect of the enrollment submissions. Once this response period has expired, the Commission compares the figures to determine if any applicant's system reaches less than 80 percent as many students as another applicant's. If so, the application resulting in service to the fewer number of students is denied, and the remaining application is granted. If more than one applicant remains, the channels or channel capacity are evenly divided among the remaining applicants. Because the applicants here did not reach an agreement regarding the use of the channels, we look to the enrollment figures submitted by each.

6. Shekinah has provided documentation showing that a total of 7,203 students will be served in the Carlsbad Municipal Schools that are specified as receive sites. We will therefore credit Shekinah with 7,203 students. Gateway submitted enrollment figures totalling 1,722 students for three Loving, New Mexico Municipal Schools and for three private schools - Bethel Christian School, Victory Christian Academy, and St. Edward's School. Gateway has submitted timely filed letters of intended use from all of the receive sites, except Bethel Christian School. A copy of the undated letter of intended use from Bethel Christian School was submitted on February 14, 1994, well after the July 20, 1993 "B" cut-off date. Consequently, the enrollment figures for Bethel Christian School will be disallowed. We will therefore credit Gateway with 1,548 students. Because the student figures credited to Gateway are less than 80 percent of the total number of students credited to Shekinah, Shekinah will be authorized to operate facilities on Channels D1-D4, and the application of Gateway will be denied.

OTHER MATTERS

7. Shekinah proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with Dalager Engineering, which conforms in all respects with our requirements.

8. No petitions to deny or informal objections have been filed against Shekinah's application, and we find Shekinah fully qualified to be an ITFS licensee. We also conclude that grant of Shekinah's application would serve the public interest, convenience and necessity.

9. Accordingly, IT IS ORDERED, That the application of Gateway Christian School (BPLIF-920603DL) IS DENIED, and the application of Shekinah Network (BPLIF-930416EC) IS GRANTED.

10. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[3] Only receive sites specified as of the "B" cut-off date may be used in determining the number of students served. *Third Report and Order Recon., supra*. Moreover, applicants serving students other than their own must have submitted letters, also by the "B" cut-off date, from those receive sites indicating an intention to use the proposed service. 47 C.F.R. Section 74.911(c); *Third Report and Order*, 4 FCC Rcd at 4832. Specifically, those letters, to be signed by the administrator or authority responsible for curriculum planning, must indicate that the applicant's programming offerings have been viewed and that such programming will be incorporated in the sites' curricula. Further, the letters should discuss the types and amounts of programming expected to be used and an indication of the extent to which representatives from the various sites will participate in the planning, scheduling, and production of the programming. 47 C.F.R. Section 74.932, Note 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Fouce Amusement Enterprises, Inc. against Crown Cable — CSR-4304-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1994; Released: December 21, 1994

By Cable Services Bureau:

1. On September 8, 1994, Fouce Amusement Enterprises, Inc. ("Fouce"), licensee of KRCA-TV, Riverside, California, filed a complaint against Crown Cable. Fouce requests that the Commission require Crown to carry KRCA-TV on its cable system serving Azusa, California.

2. Section 614 of the Communications Act of 1934, as amended, requires a cable system to carry the signals of local commercial television stations. Section 614(h)(1) defines a local commercial television station as any full power television station, other than a qualified local noncommercial educational television station, licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system.[1]

3. KRCA-TV is a commercial television station licensed to Riverside, California. Fouce notes that both Riverside and Azusa are within the Los Angeles ADI and that the cable system serving Azusa has at least 41 channels in operation. Fouce presents the following evidence in its complaint: in an August 1, 1994 letter, Fouce notified Crown that Fouce would be seeking to enforce KRCA-TV's must carry rights; on August 31, 1994, Crown sent Fouce a letter stating that because the system "has reached its required must-carry capacity," it cannot honor Fouce's carriage request.

4. In its Complaint, Fouce argues that because only 13 out of a possible 14 channels are devoted to carriage of local commercial television stations on the Azusa system, there is channel capacity to add KRCA-TV.[2] No formal opposition to Fouce's petition has been filed.

5. We agree with Fouce that the system has not reached its local commercial television station capacity, and that Crown must carry KRCA-TV. Crown does not demonstrate how it has counted its must carry signals to reach the statutory one-third system channel limit. However, the system's channel line-up card, which is attached as an exhibit to Fouce's complaint, indicates that the operator is currently carrying a total of 15 television stations, 2 of which are noncommercial educational television stations. The Commission noted in the *Must-Carry Report and Order* that the number of channels that must be set aside for commercial must-carry signals are in addition to those that must be set aside for NCE must-carry obligations. *See Broadcast Signal Carriage Issues*, 8 FCC Rcd. at 2972 n.78. Crown cannot factor in the two noncommercial stations when calculating its capacity requirements.[3]

6. In view of the above, the complaint filed on August 1, 1994, by Fouce Amusement Enterprises, Inc., licensee of KRCA-TV IS GRANTED, in accordance with §614 of the Communications Act of 1934, as amended. *See* 47 U.S.C. §535. Furthermore, Crown Cable IS ORDERED to commence carriage of KRCA-TV within forty-six (46) days from the release date of this *Order* on its system serving Azusa, California. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules, 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[1] A station's market for purposes of must-carry rights is its "area of dominant influence" or ADI, as defined by the Arbitron audience research organization. *See* 47 U.S.C. §534(h)(1)(C). Section 76.55(e) of the Commission's rules provides that the ADI's to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[2] c P37IPUnder our rules, cable operators must devote one-third of their channel capacity to the carriage of local commercial television stations. *See* 47 C.F.R §76.56(b)(2). In calculating the number of channels that represent one-third of the system's usable activated channels, cable operators should round the result to the nearest whole number. *See Broadcast Signal Carriage Issues*, 8 FCC Rcd. 2965, 2972 n.78 ("Must-Carry Report and Order"). In this case, Crown would be required to carry at least 14 local commercial television stations (i.e. 41 channels x .3333 = 13.6653 or 14 if rounded out).

[3] Due to the lack of contrary evidence in the record, we are presuming that Crown has included the noncommercial stations in its must carry channel count.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Rural California	CSR-4249-M
Broadcasting Corporation against	CA0241
TCI Cablevision of California	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1994; Released: December 21, 1994

By the Cable Services Bureau:

1. On March 29, 1994, a petition on behalf of Rural California Broadcasting Corporation, licensee of Station KRCB-TV (Educ., Ch. 22), Cotati, California, was filed with the Commission claiming that TCI Cablevision of California ("TCI"), operator of a cable television system serving Martinez, California, had declined to carry the station, even though the Grade B contour of KRCB-TV encompasses the system's principal headend located in Martinez at north latitude $37^0$41'36" and west longitude $122^0$07'21", and the station is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KRCB-TV requests that the Commission not only order TCI to carry its signal, but also order the system to carry it on Channel 22, the channel on which it broadcasts over-the-air. An opposition to this petition was filed May 9, 1994, on behalf of TCI to which KRCB-TV has responded.

2. In support of its petition, KRCB-TV indicates that it was informed by TCI on May 3, 1993, that the system believed KRCB-TV's signal strength to be inadequate and that therefore the station was not required to be carried. Although KRCB-TV states that it requested more detailed information regarding the signal strength tests relied upon by TCI, the system failed to respond.

3. In its opposition, TCI states that its principal headend is located in Briones, California, and not Martinez as indicated by KRCB-TV. Further, it states that its system engineer conducted a signal quality survey on April 21, 1993, using a Wavetek Sam IIID, calibrated April 16, 1993. It maintains that this survey determined that KRCB-TV provides a signal level of -61.0 dBm, well below the Commission standard. In addition to its signal being weak, TCI avers that KRCB-TV's picture quality is also deficient due to excessive noise and multipath interference. Because of these deficiencies, therefore, TCI claims that KRCB-TV does not qualify for carriage on its system.

4. In reply, KRCB-TV argues that TCI's opposition should be dismissed as untimely because it was submitted a full 45 days after the complaint was filed. In any event, KRCB-TV maintains that TCI has still failed to provide all of the requisite information regarding its signal strength test and has not followed generally-accepted engineering practices in conducting its test.

5. Section 615(g)(4) of the Communications Act of 1934, as amended, states that "a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission." 47 U.S.C. 535(G)(4). Because the cable operator is in the best position to know whether a given NCE station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it has used good engineering practices, as defined below, to measure the signal delivered to the headend.

6. With respect to the standard to be used to determine what constitutes a "good quality" signal, we note that the 1992 Cable Act failed to set a standard for either VHF or UHF noncommercial stations. However, the 1992 Cable Act did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial station signals. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine, absent other evidence, whether VHF or UHF non-commercial stations place adequate signal levels over a cable system's principal headend.

7. In this instance, TCI determined KRCB-TV's signal strength to be below the requisite level for a VHF commercial station. We find, however, that the cable system failed to following generally acceptable engineering practices in making its determination. Generally, if the test results are less than -55 dBm for a VHF station, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24 hour period, with measurements no more than 4 hours apart to establish reliable test results.

8. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements, cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done. When measured against these criteria, we conclude that the data submitted by TCI is insufficient to demonstrate that KRCB-TV's signal is not of "good quality" at the cable system's headend.

9. KRCB-TV's petition establishes that it is entitled to carriage on the Martinez, California, cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Accordingly, the petition filed March 29, 1994, by Rural California Broadcasting Corporation IS GRANTED, pursuant to §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and TCI Cablevision of California

IS ORDERED to commence carriage of KRCB-TV on cable channel 22 forty-five days from the release date of this *Order* unless TCI submits within fifteen days the engineering data required herein to support its assertion of poor signal quality from KRCB-TV at TCI's principal headend. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MONTROSE SCHOOL DISTRICT #43-2
Montrose, South Dakota — File No. BPLIF-920320DM

OLDHAM-RAMONA SCHOOL DISTRICT #39-5
Colman, South Dakota — File No. BPLIF-930219ED

For Construction Permit and License in the Instructional Television Fixed Service on Channels D1-D4

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1994; Released: December 21, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Montrose School District #43-2 (Montrose) and Oldham-Ramona School District #39-5 (Oldham), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels D1-D4 in the areas of Montrose and Colman, South Dakota, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Both Montrose and Oldham are school districts accredited by the South Dakota State Board of Education and are applying to provide ITFS service to students enrolled at schools within their jurisdictions.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate to another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Both applicants are entitled to four points because they are school districts that propose to offer ITFS programming to serve students enrolled at schools within their respective jurisdictions.

Accreditation. Both applicants are entitled to three points for being accredited by the South Dakota State Board of Education.

Four-Channel Limitation. Neither applicant is the current licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

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[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

Montrose's illustrative schedule and programming grid propose an average of 24.375 hours of ITFS programming per channel per week, all of which is to be formal educational programming. Consequently, Montrose is entitled to one programming merit point. In contrast, Oldham's programming grid proposes 21 hours of formal educational programming per channel per week, while its illustrative schedule proposes an average of 21 hours of ITFS programming per channel per week, of which only 15.375 is formal educational programming. Since the lesser amount of formal educational programming specified in the illustrative schedule does not reach the threshold amount at which merit points are awarded, Oldham is entitled to no programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. Montrose is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. Oldham is entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation, for a total of nine points. Thus, the tentative selectee is Montrose.

OTHER MATTERS

5. No determination has been made that the tower heights of two of the receive sites proposed by Montrose would not constitute a hazard to air navigation. Accordingly, a grant of a construction permit/license to Montrose will be appropriately conditioned.

6. Montrose proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with Rural Vision Central, Inc., which conforms in all respects with our requirements.

7. There are no petitions to deny or informal objections outstanding against Montrose's application, and we find Montrose fully qualified to be an ITFS licensee. We also conclude that grant of Montrose's application would serve the public interest, convenience and necessity.

8. Accordingly, IT IS ORDERED, That the application of Oldham-Ramona School District #39-5 (BPLIF-930219ED) IS DENIED, and the application of Montrose School District #43-2 (BPLIF-920320DM) IS GRANTED, subject to the following:

> This authorization is subject to the condition that construction of the receive towers at receive sites locations R20 and R21 is prohibited until clearance is received from the Federal Aviation Administration, the Commission is so notified, and appropriate painting and lighting specifications are determined.

9. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Greater Dayton	CSR-4090-M
Public Television against	IN0057
Sammons Communications, Inc.	

Request for Carriage and
Channel Positioning

MEMORANDUM OPINION AND ORDER

Adopted: December 15, 1994; Released: December 21, 1994

By the Cable Services Bureau:

INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) became law.[1] On December 4, 1992, the 1992 Cable Act's requirements for mandatory carriage of certain noncommercial educational stations set forth in §5 of the 1992 Act became effective.[2] On October 4, 1993, Greater Dayton Public Television (GDPT), licensee of station WPTO (Educ., Channel 14), Oxford, Ohio, filed a complaint seeking to ensure WPTO's carriage on channel 14 on the cable system of Sammons Communications, Inc., serving Connersville, Indiana. Sammons became the successor-in-interest of the petition filed by Cardinal Communications, Inc. on July 22, 1993. On October 28, 1993, Sammons filed an opposition to this complaint. GDPT filed a reply to this opposition on November 8, 1993.

SUMMARY OF PLEADINGS

2. GDPT maintains that, despite its status as a qualified noncommercial television broadcast station that operates within 50 miles of the principal headend of Sammons' Connersville cable system, Sammons refuses carriage of the station on its requested channel position. Sammons seeks a ruling that it is not required to carry WPTO until the station pays for equipment which is necessary to receive its signal, and further pays the estimated increase in copyright royalty payments associated with its carriage or, in the alternative, establishes a letter of credit in the amount of the estimated fees. Sammons also seeks permission to carry WPTO on channel 18 in order to avoid the cost of removing traps currently on channel 14. WPTO states that Sammons is acting in violation of the 1992 Cable Act, and contrary to the Commission's implementing rules.

3. On July 19, 1993 WPTO was notified that Sammons Communications, Inc. had purchased Cardinal. GDPT wrote to Sammons on July 23,1993 requesting confirmation that WPTO would be carried in Connersville on channel 14 by a date specific. Sammons replied on August 16, 1993 by stating that carriage in Connersville would require a $1,176.33 advance payment for equipment (and installation of that equipment) necessary for a good quality signal, and needed either advance payment or a letter of credit to satisfy the $1,110.48 copyright liability Sammons would incur for carriage of GDPT's stations. This letter does not specify whether these costs are related to the carriage of WPTO, or co-owned WPTD or both stations. Sammons again included a channel line-up for the Connersville system showing carriage of WPTO on channel 18.

4. Further correspondence between the parties failed to resolve these issues. In particular, on September 3, 1993 GDPT proposed channel 4 as an alternative channel position for its station on this system. Sammons responded to this proposal by reiterating its claim of a great expense to trap a pay channel currently carried on channel 14 and its inability to accommodate the request for channel 4 since another broadcast signal occupies that position. On October 4, 1993 GDPT filed its complaint with the Commission seeking carriage of WPTO on channel 14 in accordance with the terms of Section 5 of the 1992 Cable Act.

5. In its reply to the complaint, Sammons begins by noting that WPTO has not been carried in Connersville in the past. It states that no equipment has ever been located on the tower which would enable the Connersville system to receive WPTO's signal and, as such, WPTO must bear the costs of a specialized antenna and other equipment necessary for the cable system to receive a good quality broadcast signal from WPTO.[3] Sammons asserts that to carry the complainant on channel 14 would require removing and replacing 560 channel traps at a total cost of approximately $10,000. Additionally, Sammons argues that because carriage of WPTO would increase Sammons's copyright liability WPTO--prior to carriage--must either pay the estimated cost of the first copyright period or establish a letter of credit or other security for the period of the station's must carry election.[4] Alternatively, Sammons requests that the Commission not require carriage until the Supreme Court decides the validity of the 1992 Cable Act's must-carry provisions.

6. In its reply to Sammons, WPTO states its belief that past correspondence confirming that the station would be carried on channel 18 proves that WPTO has met signal quality standards; thus no "specialized" antennas are necessary for Sammons to receive WPTO's signal. WPTO argues

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 47 U.S.C. § 535. *Compare with Turner Broadcasting System, Inc. v. Federal Communications Commission*, 114 S. Ct. 2445 (1994). In remanding the case, the Court determined that issues of material fact must be resolved by the lower court. Specifically, the Court indicated that the government must show that the must-carry provisions are necessary to alleviate the alleged harms and that they do not burden substantially more speech than necessary to further such protection. *Id.* at 2451.

[3] We note that in its complaint, GDPT indicates that it received signal quality measurement data for WPTD, but not for WPTO. The Commission's must-carry implementing rules required a cable operator to notify all local broadcast stations not meeting a good quality signal by May 3, 1993. 47 C.F.R. § 76.58(d). GDPT received no information suggesting that WPTO did not provide a good quality signal. This is further confirmed by the inclusion of WPTO on the list of signals to be carried on June 23.

[4] We note that the election of must-carry status for a three-year period applies only to commercial stations. Qualified local commercial stations request carriage under the provisions of Section 5 of the 1992 Cable Act and that request is not subject to any time limitation. Section 615(b)(1).

that where a broadcast station already delivers a good signal a cable operator may not shift the costs of routine reception of that signal to those seeking must-carry status.[5] WPTO requests that the Commission review Sammons's current method of receiving WPTO and determine whether any existing antennas used to receive Cincinnati area stations (in the same general direction as Oxford) can be utilized to receive WPTO. Finally, WPTO states that it is located only 21 miles from Connersville and thus is a "local" signal for Copyright Act purposes; thus, Sammons will incur no copyright liability for the station's carriage.

DISCUSSION

7. We uphold WPTO's complaint against Sammons. With regard to the issue of signal quality, § 615(g)(4) of the Communications Act of 1934, as amended, states that "a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission." 47 U.S.C. § 535(g)(4). Because the cable operator is in the best position to know whether a given noncommercial educational station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it has used good engineering practices, as defined below, to measure the signal delivered to the headend.

8. While the 1992 Cable Act does not state what constitutes a "good quality" signal where VHF or UHF noncommercial stations are concerned, the Act did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the Act set out a standard of -45 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial station signals. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine, absent other evidence, whether VHF or UHF non-commercial stations place adequate signal levels over a cable system's principal headend. Where there is a dispute over signal level measurements, cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done.

9. While Sammons believes that additional equipment is needed to enable its Connersville system to receive a good quality signal for WPTO and that the station should purchase the needed equipment, we find that the cable operator has failed to substantiate its case. Though Cardinal Communications, Sammons's predecessor in interest, performed a signal strength test at its Connersville system for WPTD,[6] no such signal strength data has been provided WPTO. Consequently, we find that Sammons failed to carry its burden of proof when it denied WPTO carriage based on inferior signal quality.

10. We also find that Sammons is required to carry WPTO on channel 14. Section 615(g)(5) of the 1992 Cable Act permits a noncommercial educational station to elect its over-the-air channel number as its channel position on a cable system.[7] WPTO has properly requested carriage on channel 14 on Sammons' cable system the same channel number it is broadcast over the air. Under or rules, cable operators must comply with the channel positioning requirements absent a compelling technical reason. Sammons has failed to show a compelling reason to warrant waiver of the on-channel carriage requirement. Although we have stated previously that the need to employ additional traps or make technical changes are not sufficient grounds for waiver.[8] we do believe that there are certain circumstances where the costs could be so compelling as to warrant a waiver of the rules. Apart from an unsupported claim that replacing the traps to allow it to carry WPTO on channel 14 would cost 10,000 dollars, Sammons has introduced no evidence demonstrating how such costs would substantially impact the cable system. Unsupported claims of costs in isolation are not grounds for waiver of the commission's rules. *See Chambers Cable of Ortegon, Inc.*, 5 FCC Rcd 5640, 5641 (1990).

11. Finally, with regard to copyright liability, Sammons contends that its copyright liability would increase were it to carry WPTO. WPTO argues that its carriage would not result in Sammons' incurring additional copyright liability because its signal is considered "local" for copyright purposes. We begin by noting that copyright liability would not attach under the Copyright Act if, under our Rules in effect on April 15, 1976, WPTO would have been consid-

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[5] GDPT states that is unclear whether its signal is currently carried by this cable system since it received notification from Cardinal on June 1, 1993, that WPTO would be added to the Connersville system on channel 18 at that time. If it is being carried, complainant contends then its signal is being received with the currently available antenna.

[6] Cardinal tested WPTD's signal. The test results, included in WPTO's pleadings, lists the headend location, the engineer's name, the type of antenna use, the level at which the reading was taken, tower height, calibration, measurement methodology, date and time of tests, weather at time of test, signal level. At the bottom of this document the word "yes" appears in response to the statement "meets quality signal standards".

[7] Noncommercial educational stations are also allowed to choose their cable channel position based on the cable channel on which it was carried on July 19, 1985. See 47 C.F.R. § 76.57(b).

[8] "We do not believe that inconvenience, marketing problems, the need to reconfigure the basic tier or the need to employ additional traps or make technical changes are sufficient reasons for denying the channel positioning request of a must-carry signal. Only where placement of a signal on a chose channel results in interference or degraded signal quality to the must-carry station or an adjacent channel, or causes a substantial technical or signal security problem, will we permit cable operators to carry a broadcast signal on a channel not chosen by the station." *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965, para. 91 (1993). Sammons has introduced no evidence which would indicate that removal of the necessary traps would constitute a substantial technical problem.

ered a "local" station entitled to carriage based on our former must-carry rules.[9] Section 76.57 of our former carriage Rules covered a cable system, such as the Connersville system, that "serves a community located wholly outside all major and smaller television markets." Under this former section, WPTO would have had must carry status if the Connersville system were within WPTO's Grade B contours; or if Connersville system were within WPTO's specified zone.[10] A review of the pertinent information reveals that WPTO could have demand carriage under our former carriage rules as a "local" station under either criteria. Thus, Sammons has no claim to copyright indemnification.

12. Accordingly, the petition filed on October 4, 1993, by Greater Dayton Public Television, IS GRANTED, in accordance with Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended. Sammons Communication, Inc., of Dallas, Texas IS ORDERED to commence carriage of WPTO on cable channel 14 forty-five (45) days from the release date of this *Order*. This *Order* shall take effect unless Sammons communications Inc., of Dallas, Texas submits, within fifteen (15) days from the release date of this order, engineering data which demonstrates WPTO's poor signal quality at the principal headend of Sammons communication Inc., of Dallas, Texas serving Connersville, Texas. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[9] 17 U.S.C. §111(d)(3)(A)-(C),(f) (1993).
[10] A "specified zone of a television broadcast station is the area extending 35 air miles from the reference point in the community to which that station is licensed or authorized by the Commission..." § 76.5(f) (former Rules).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-152

In the Matter of

Amendment of Section 73.202(b), RM-8565
Table of Allotments,
FM Broadcast Stations.
(Bells, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 14, 1994; Released: December 22, 1994

Comment Date: March 13, 1995
Reply Comment Date: March 28, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Thomas S. Desmond ("petitioner") requesting the allotment of Channel 225A to Bells, Texas. [1] Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 225A to Bells since an interest has been expressed in providing the community with its first local FM service. Channel 225A can be allotted to Bells in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Bells, Texas	--	225A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 13, 1995,** and reply comments on or before **March 28, 1995,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Stephan M. Kramer, P.E. and Associates
Broadcast and FAA Consulting Engineers
10500 Bighorn Trail, Suite 100
McKinney, TX 75070-6208
(Consultant to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] Although the petitioner's request was signed, he failed to state his address and include an affidavit verifying that the statements contained in his petition were accurate to the best of his knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.420(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes,* 5 FCC Rcd 3911, 3919, n.41 (1990). The petitioner is requested to rectify these omissions in his comments.

[2] The coordinates for Channel 225A at Bells are 33-36-37 North Latitude and 96-24-38 West Longitude.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-151

In the Matter of

Amendment of Section 73.202(b), RM-8555
Table of Allotments,
FM Broadcast Stations.
(Buffalo and Lamar,
Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 14, 1994; Released: December 22, 1994

Comment Date: March 13, 1995
Reply Comment Date: March 28, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed jointly by KBFL Broadcasting Company ("KBFL"), licensee of Station KFBL(FM), Buffalo, Missouri, and KHST Broadcasting Company ("KHST"), licensee of Station KHST(FM), Lamar, Missouri (jointly referred to as "petitioners"). KBFL requests the substitution of Channel 260C3 for Channel 260A at Buffalo, Missouri, and modification of the license for Station KFBL(FM) accordingly. KHST requests substitution of Channel 269A for Channel 260A at Lamar, Missouri, and modification of the license for Station KHST(FM) to specify operation on Channel 269A. The petitioners provided an engineering study in support of the proposal and indicated they would apply for the respective channels.

2. In support of the proposal, petitioners state that substitution of the channels at Buffalo and Lamar will permit improved service by both stations to their respective communities. Petitioners point out that modification of the license for Station KBFL(FM) at Buffalo will permit the station to serve a much larger area, thereby increasing the number of broadcast signals available to the public in the area, while promoting a more efficient use of the spectrum. In addition, petitioners state that the license of Station KHST(FM) is made up of the same principals which own Station KBFL(FM). Thus, there is no objection to the allotment changes requested and no need for the Commission to issue an order to show cause. Further, the expenses involved in the proposed change in frequencies for Station KHST(FM), Lamar, will naturally be borne by the same principals that own station KBFL(FM).

3. We believe the public interest will be served by the proposed substitutions because they will result in the provision of expanded service at Buffalo. Channel 260C3 can be allotted to Buffalo, Missouri, at KBFL's proposed site in compliance with the Commission's minimum distance separation requirements. [1] Channel 269A can be allotted to Lamar, Missouri, in compliance with the Commission's spacing requirements at the existing site for Station KHST(FM).[2] We shall propose to modify the license of Station KBFL(FM), Buffalo, Missouri, to specify operation on Channel 260C3, as requested. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept other expressions of interest in the channel.

4. Accordingly, for the reasons stated above, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Buffalo, Missouri	260A	260C3
Lamar, Missouri	260A	269A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 13, 1995,** and reply comments on or before **March 28, 1995,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows: William J. Pennington, III, 5519 Rockingham Road-East, Greensboro, North Carolina 27407.

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. How-

[1] The coordinates for Channel 260C3 at Buffalo are 37-35-30 and 93-02-30.
[2] The coordinates for Channel 269A at Lamar are 37-25-27 and 94-16-12.

ever, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-14

In the Matter of

Amendment of Section 73.202(b),	RM-8426
Table of Allotments,	RM-8471
FM Broadcast Stations.	
(Van Wert and Richwood, Ohio)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 13, 1994; Released: December 22, 1994

By the Chief, Allocations Branch:

1. At the request of Van Wert Radio ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 1031 (1994), proposing the allotment of Channel 282A to Van Wert, Ohio, as the community's second local FM broadcast service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. Comments and a counterproposal were also filed by Janice M. Scantland ("Scantland"), requesting the substitution of Channel 282B1 for Channel 282A at Richwood, Ohio, and the modification of her construction permit (BPH-920113MC) for a new FM station to specify the higher powered channel.[2] Van Wert and Richwood are located approximately 92 kilometers apart while the Commission's Rules specify a required minimum distance separation of 143 kilometers for co-channel Class A and Class B1 allotments. Therefore, the proposals are mutually exclusive.

2. Scantland states that Richwood is located in Union County and has a 1990 population of 2,186 persons and that her construction permit for a new FM station represents the community's sole local aural transmission service. Although Van Wert is larger in population, it receives local service from two aural stations, one FM and one AM, and thus she believes the public interest would be best served by substituting Channel 282B1 for Channel 282A at Richwood and the modification of her construction permit to specify the higher class channel. Further, Scantland states that she will apply for the channel, if allotted. In reply comments, Scantland submits that both petitioners can be accommodated by allotting Channel 230A in lieu of Channel 282A to Van Wert.

3. Based on the information before us, we believe that each of the petitioners has shown that the public interest would be served by a grant of their respective petitions. Further, we find that each of the requests can be accommodated and thus there is no need to comparatively consider the requested allotments at Van Wert and Richwood.

TECHNICAL SUMMARY

4. Channel 230A can be allotted to Van Wert in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.0 kilometers (7.5 miles) east to avoid a short-spacing to Station WGLF-FM, Channel 231A, Roanoke, Indiana. Channel 282B1 can be allotted to Richwood with a site restriction of 20.8 kilometers (12.9 miles) west to avoid short-spacings to vacant but applied-for Channel 280A, Westerville, Ohio, Station WPAY-FM, Channel 281C, Portsmouth, Ohio, and Station WQKT, Channel 283B, Wooster, Ohio.[3] Since both communities are located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence in the allotments by the Canadian Government has been received. We recognize that Channel 230A at Van Wert is short-spaced to Station CKLW-FM, Channel 230C1, Windsor, Ontario, Canada. However, a staff study has confirmed that the overlap area of the interfering contour of the Van Wert station and the protected contour of Station CKLW-FM is located entirely on the U.S. side of the border. Therefore, the Canadian Government has concurred in the allotment of Channel 230A as a specially negotiated short-spaced allotment.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 6, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Richwood, Ohio	282B1
Van Wert, Ohio	230A, 255B

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Janice M. Scantland (BPH-920113MC) for a new station at Richwood, Ohio, IS MODIFIED to specify operation on Channel 282B1, in lieu of Channel 282A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

[1] The community of Richwood has been added to the caption.a

[2] Public Notice of the filing of the counterproposal was given on May 11, 1994, Report No. 2010.

[3] The coordinates for Channel 230A at Van Wert are 40-50-54 North Latitude and 84-26-36 West Longitude. The coordinates for Channel 282B1 at Richwood are 40-24-41; 83-32-41.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Janice M. Scantland, permittee of a new station on Channel 282A at Richwood, Ohio, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

8. The window period for filing applications for Channel 230A at Van Wert, Ohio, will open on **February 6, 1995,** and close on **March 9, 1995.**

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-272

In the Matter of

Amendment of Section 73.202(b), RM-8361
Table of Allotments,
FM Broadcast Stations.
(Madrid, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 14, 1994; Released: December 22, 1994

By the Chief, Allocations Branch:

1. At the request of Madrid Broadcasting Company ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 7676 (1993), proposing the allotment of Channel 241A to Madrid, Iowa, as the community's first local aural transmission service. Petitioner filed comments stating its intention to apply for Channel 241A, if allotted. Boone County Broadcasting Company filed comments supporting the allotment of Channel 241A. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 241A at Madrid, since it could provide the community with its first local aural transmission service. Channel 241A can be allotted to Madrid in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.5 kilometers (8.4 miles) north to avoid short-spacings to Station KCOB-FM, Channel 240A, Newton, Iowa, and Station KEFM(FM), Channel 241C, Omaha, Nebraska.[1] We note that the coordinates for Channel 241A at Madrid are short-spaced to the allotment coordinates for Channel 241A at Hudson, Iowa. However, a construction permit (BPH-920430MC) has been granted for Channel 241A at Hudson and the site specified in the construction permit meets the Commission's minimum distance separation requirements with regard to the allotment of Channel 241A at Madrid. Therefore, the issuance of a license for Channel 241A at Madrid, Iowa, may be withheld until Station KAHG(FM), Channel 241A, Hudson, Iowa, is licensed at the site specified in its construction permit.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 6, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Madrid, Iowa	241A

4. The window period for filing applications will open on **February 6, 1995**, and close on **March 9, 1995.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 241A at Madrid are North Latitude 41-59-47 and West Longitude 93-48-52. As stated in the *Notice*, the allotment of Channel 241A at Madrid is short-spaced to Station KQWC(FM), Channel 240A, Webster City, Iowa. However KQWC(FM)'s license was modified to specify Channel 239C3 pursuant to the *Report and Order* in MM Docket 88-369 and a license has been issued to Station KQWC(FM) specifying operation on Channel 239C3 (BLH-910522KA), thereby eliminating the short-spacing conflict.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-98

In the Matter of

Amendment of Section 73.202(b),	RM-8433
Table of Allotments,	
FM Broadcast Stations.	
(Addison, Alabama)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 13, 1994; Released: December 22, 1994

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 9 FCC Rcd 4816 (1994), issued in response to a petition filed on behalf of Dorsey Eugene Newman ("petitioner") proposing the allotment of FM Channel 289A to Addison, Alabama, as that community's first local aural transmission service. Petitioner filed comments in support of the proposal. No other comments were received.

2. We believe the public interest would be served by allotting Channel 289A to Addison, Alabama, since it could provide a first local aural transmission service to the community.

TECHNICAL STATEMENT

3. As indicated in the *Notice*, Channel 289A can be allotted to Addison in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 12.9 kilometers (8.0 miles) northeast of the community at coordinates 34-16-00 and 87-04-00. The site restriction is required to avoid a short spacing to the licensed site of Station WKXM-FM, Channel 290A, Winfield, Alabama, at coordinates 34-01-53 and 87-48-06.[1]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 6, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include Addison, Alabama, as follows:

City	Channel No.
Addison, Alabama	289A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications for Channel 289A at Addison, Alabama, will open on **February 6, 1995,** and close on **March 9, 1995.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process for Channel 289A at Addison, Alabama, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As stated in the *Notice*, while the restricted site for Channel 289A at Addison is short spaced to the allotment reference coordinates for Channel 291C3 at Hartselle, Alabama, at coordinates 34-27-09 and 86-42-27, it does comply with the minimum distance separation requirements at the licensed site of Station WTAK-FM, Channel 291C3, Hartselle, at coordinates 34-27-45 and 86-38-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

L. DOUGLAS WILDER and
MARSHALL COLEMAN

Against Station WRIC-TV
Petersburg, Virginia

ORDER

Adopted: December 13, 1994; Released: December 23, 1994

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it a complaint filed March 23, 1993, on behalf of L. Douglas Wilder and Marshall Coleman ("complainants"), a motion to dismiss filed April 7, 1993, by Nationwide Communications, Inc. ("Nationwide"), licensee of station WRIC-TV, Petersburg, Virginia, and related pleadings.[1] Complainants allege that television Station WRIC-TV overcharged them during the 1989 elections in violation of the lowest unit charge ("LUC") requirements of Section 315(b) of the Communications Act of 1934, as amended.[2] Wilder and Coleman were legally qualified candidates for nomination and election for Governor for the Commonwealth of Virginia for the 1989 primary election and the November 7, 1989, general election. Complainants seek discovery, and, in the event it is determined that the licensee violated the LUC requirements, disciplinary action against the licensee and refunds of the overcharges, together with interest and attorney's fees.

2. Applying the guidelines set forth in *Lowest Unit Charge Requirements*, 6 FCC Rcd 7511 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992) (*"Declaratory Ruling"*), to the matters before us, we find that the complainants have established a *prima facie* case of a violation by Station WRIC-TV of the LUC requirements with respect to the various purchases they made during the period preceding the 1989 primary and general elections. Our reasons follow, together with a timetable and procedures for discovery, post-discovery, and election of a procedure for resolving those portions of the complaint which present a *prima facie* case.

3. To establish a *prima facie* case, a complainant must, at a minimum, submit "a short, plain statement of the claim sufficient to show that the complainant is entitled to the relief requested." *Declaratory Ruling*, 6 FCC Rcd at 7513. The *Declaratory Ruling*, 6 FCC Rcd at 7521, n.46, also stated that Section 315(b) complaints should be filed with the Commission in a timely manner.

4. Complainants allege that WRIC-TV overcharged them by as much as $204,694 during the 1989 LUC periods. Complainants submit a declaration under penalty of perjury by Leslie J. Edelstein. Ms. Edelstein states that she is employed by one of the law firms representing the complainants, that she purchased time for candidates in the 1990 and 1992 elections, and that she is familiar with sales practices and terminology in connection with the sale of political advertising. She alleges that she analyzed the 1989 "buy records" of "certain candidates" of Station WRIC-TV, which were provided to her by the candidates or their representatives. She then compared those records with rates derived by multiplying household ratings for various dayparts of Station WRIC-TV obtained from Arbitron's "Television Market Report" by the average SCOOP[3] rate for that daypart in the Richmond market. After calculating the difference between the SCOOP based rate and the cost for each spot bought by the candidate, she then multiplied that figure by the total number of each such spot purchased to determine the total amount of the overcharges. In addition to Ms. Edelstein's analysis, the complainants point to five 30-second spots purchased by them where

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[1] Also before us are an opposition to motion to dismiss filed April 15, 1993, by the complainants, and a reply to opposition to motion to dismiss filed April 26, 1993, by Nationwide. In addition, on May 10, 1993, complainants filed a motion to strike Nationwide's reply, which Nationwide opposed. Inasmuch as Nationwide may reply pursuant to Section 1.45 of the Commission's Rules, we deny complainants' motion to strike.

In *Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith*, 7 FCC Rcd 6661 at n.3 (MMB 1992), (*"Chiles"*), we stated that "[i]n the future, pleadings other than the complaint and the answer to the complaint will not be accepted unless the party filing the additional pleading has demonstrated that the information presented is new and vital to the resolution of the complaint, and could not have been included in the original complaint because the facts were previously unknown or unavailable to the complainant, and could not have been discovered through reasonable efforts." Our intent was to simplify the initial processing of lowest unit charge ("LUC") complaints. To the extent we did not make our position clear, we now emphasize that, in determining whether a *prima facie* case exists of a violation of the LUC requirements, we will not consider pleadings, petitions, motions and pleadings responsive thereto, including those which would normally be allowed pursuant to Section 1.45 of the Commission's Rules. Henceforth, no pleadings, other than a complaint and an answer, or a motion to dismiss in lieu of an answer, will be considered unless the pleading meets the test set forth in *Chiles*.

[2] Section 315(b)(1) provides as follows:

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -

> (1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period ....

47 U.S.C. Section 315(b)(1). *See also* 47 C.F.R. Section 73.1942(a).

[3] "SCOOP" is the acronym for Spot Cost Outlook and Projections. SCOOP is a product of "Media Market Guide." SCOOP provides cost-per-point information for eight dayparts and various demographics.

they paid more than the highest 30-second rate charged by the station in 1989 as set forth in the 1990 edition of the *Television and Cable Factbook*.

5. In its motion to dismiss, Nationwide does not address the merits of complainants' allegations.[4] Rather, Nationwide submits that the Wilder/Coleman complaints are untimely or barred by laches and should be dismissed. Nationwide observes that more than three years passed between the elections and the filing of the complaint. In addition, Nationwide cites the limited correspondence between itself and the complainants, the complainants' failure to inspect the station's political file, the lack of specificity of the complainants' charges, and the complainants' failure to object to WRIC-TV's 1991 renewal application. Finally, Nationwide contends that because the employee who had primary responsibility for the sale of political time is no longer with the station, it would be difficult to defend itself against complainants' allegations.

6. In opposing Nationwide's motion, complainants submit that there are no statutes of limitations related to claims for refunds for violations of the LUC although they concede that the time for issuing a forfeiture has passed.[5] In their view, LUC violations, whenever determined, should result in refunds and appropriate disciplinary action. Alternatively, complainants contend that the Commission should apply a local statute of limitations to claims for refunds for LUC violations, citing, *e.g., Wilson* v. *Garcia*, 471 U.S. 261, 266-67 (1985) and *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). With respect to the instant complaints, complainants suggest that the Commission should apply Virginia's five-year limitations period for alleged breach of a written contract. *See* Virginia Code Section 8.01-246(2) (1992). Complainants also find immaterial whether the complaint was filed within the two-year retention period for political records mandated by our rules or whether a complainant inspected those records. Complainants note that the public file contains only political contracts, not the commercial contracts which licensees considered in calculating their lowest unit rates. Complainants contend that, in all likelihood, Nationwide still has a record of its commercial contracts. Finally, complainants argue that any statute of limitations should be tolled because of Nationwide's refusal to allow complainants to review commercial contracts.

7. In reply, Nationwide argues that complainants' reliance on a state statute of limitations is misplaced because the dispute concerns whether the licensee violated federal law. Nationwide also contends that complainants are not entitled to rely on equitable tolling. Nationwide submits that it has committed no fraud upon the complainants and that it has not taken any action to impede complainants from filing their complaint.

DISCUSSION

8. We shall not dismiss the complaint as untimely. Here,[6] there has been no change in the licensee of the station or claim that the licensee no longer has access to relevant files. The licensee does cite the passage of time and the loss of one employee as reasons for dismissing the complaint. While the passage of time and the loss of a key employee may render more difficult the licensee's task of responding to the complaint, it does not appear that the licensee's ability to defend itself has been significantly affected. In this regard, there is no indication that any records necessary to determine whether overcharges occurred are or may be unavailable. In any event, records are discoverable only to the extent that they exist. Accordingly, we will not dismiss the complaint as untimely.

9. With respect to the merits of the complaint, we find that there is sufficient information for us to determine that overcharges may have occurred. The complaint lists a series of dayparts and charges paid by complainants and compares those charges with average rates derived from multiplying SCOOP cost per point data by WRIC-TV's ratings for various dayparts. In the instances noted, the price paid by complainants clearly exceeds the alleged SCOOP rate.[7]

10. In the *Declaratory Ruling*, the Commission determined that, once a *prima facie* showing has been made, the complainant will be entitled to limited discovery, subject to specific conditions established by the Bureau. *See* 6 FCC Rcd 7313-14, 7521, n.49. *See also, Chiles*, 7 FCC Rcd at 6665. Accordingly, we will allow complainants limited discovery on the issue of overcharges during the 45 days before the 1989 primary and the 60 days before the November 1989, general election regarding certain spots purchased by them. The documents set forth in Appendix A to this *Order*, and answers to the written interrogatories set forth in Appendix B to this *Order*, must be served upon counsel for complainants (not the Commission) by Station WRIC-TV on or before the first day of the discovery period, which will be 30 days after the release date of this *Order*. *See* Appendix C.

11. Any request for further discovery by complainants must contain a showing that such discovery is necessary to resolve the issue of overcharges. Any discovery request by the station for production of documents, answers to written interrogatories, or for the taking of depositions must dem-

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[4] Nationwide states that it will not answer the complaint until its motion to dismiss is denied or until it is ordered to submit an answer. The procedures established by the Commission require that any answer to the complaint be filed within ten days of the complaint. *Declaratory Ruling*, 6 FCC Rcd at 7513. The procedure suggested by the Nationwide does not conform to our requirements, and Nationwide will not be afforded additional time to file an answer.

[5] Although the complaint pertains to the 1989 elections, it was not filed until March 23, 1993, more than one year after the last renewal of license for Station WRIC-TV. Hence, even if LUC violations occurred, no forfeiture can be assessed. Section 503(b)(6) of the Communications Act of 1934, as amended.

[6] In *Harvey Sloane*, 9 FCC Rcd 1592 (MMB 1994), *application for review pending*, a LUC complaint was dismissed as untimely where the licensee had refunded money to the complainant and then sold the station pursuant to an assignment of the station's license without having heard further from the complainant or having received any objection to the sale. In addition, because more than two years had passed between the date of the elections at issue and the filing of the complaint, the station no longer maintained in its political files candidate information from those elections.

[7] Because we find a *prima facie* case based on alleged overcharges using SCOOP, we need not decide whether reliance on the *Television and Cable Factbook* is appropriate under the circumstances presented here.

onstrate that the information requested is necessary for the station to respond to arguments or claims that could be made by complainants in their amended complaint. We emphasize that any request for depositions must also demonstrate that depositions are necessary to resolution of the issue of overcharges and include a list of the proposed deponents.[8] All discovery requests must be filed within the discovery period set forth in Appendix C. The Bureau will rule on all such requests as expeditiously as possible.

12. Documents produced by the station that contain proprietary information may be redacted to delete the identities of commercial advertisers, including the name of the commercial advertiser, its address and telephone number, and the name(s) of any person employed by the advertiser. Where any such information is redacted, the station shall advise complainants of the type of information deleted. Further redactions will be allowed only if the information redacted is proprietary and not relevant to resolution of the complaint. Should complainants serve documents upon the station, they may redact proprietary information and so advise the station of the type of information deleted. Any objections to redactions that are not resolved by the parties should be submitted to the Bureau in a written pleading for resolution, along with copies of the documents at issue with the disputed information intact. As with all discovery matters, the parties should make good faith attempts to resolve any discovery dispute before presenting such a dispute to the Bureau.

13. Any documents, answers to written interrogatories, or deposition transcripts, if any, produced during discovery, and the information revealed thereby, shall not be provided to any third party other than the Commission. Copies of all documents, answers to written interrogatories, and deposition transcripts produced shall be stamped with the statement: "This document is subject to a protective order entered by the Federal Communications Commission." It shall be the responsibility of the party producing the documents, answers to written interrogatories, or deposition transcripts to affix the stamp.

14. The parties must take reasonable measures to prevent unauthorized access to the documents, answers to written interrogatories, and deposition transcripts. Access must be limited to complainants, the management of Station WRIC-TV, their attorneys and staffs, and expert witnesses. Either party may require the other to disclose in writing the names of staff and experts who have access to documents and written information. Each party must explain to all staff and experts that the documents, answers to written interrogatories, deposition transcripts, and their contents may not be disclosed to any entity other than the Commission.

15. None of the materials produced, nor the contents thereof, may be used for any purpose other than the prosecution of the instant complaint. Each individual who is provided access to these materials is hereby required to certify in writing that he or she has personally reviewed this order and understands the limitations imposed on the signing party. No copies of materials protected by this order may be made except copies to be used by the parties identified in this paragraph. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided. Upon termination of this proceeding, including any appeals, petitions or settlement, all originals and reproductions of any protected materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the protected materials of an opposing party shall be destroyed.

16. The parties may agree to additional reasonable measures to protect the confidentiality of information as the circumstances may warrant. Such agreement should be confirmed in writing and a copy provided to the Bureau. As noted in the *Declaratory Ruling*, any failure to abide by the terms of this protective order may result in the imposition of sanctions, including dismissal of the complaint or censure, suspension, or disbarment of the attorneys involved. *See* 47 C.F.R. Section 1.24.

17. Extensions of the discovery period (Appendix C) will be granted only where extraordinary circumstances exist and the parties agree to the extension, or both parties submit declarations that serious settlement discussions are ongoing. Any deadlines within the discovery period may be changed by mutual agreement, with notification to the Bureau, as long as all discovery is completed within the required time. Service of documents, discovery requests, and any pleading which requires a ruling by the Bureau is to occur by the dates set in Appendix C, unless modified by the Bureau or by mutual agreement of the parties.

18. Within 30 days after completion of discovery, complainants must file an amended complaint, alleging specific facts based on the information discovered, stating the nature of the Section 315(b)(1) violation and the amounts said to be owed. After the station has filed its answer, the parties shall file with the Bureau their election to have the complaint resolved either by the Bureau or by Alternative Dispute Resolution.

19. Settlement of lowest unit charge claims is strongly encouraged. Although the Commission retains its discretion to determine whether additional sanctions are warranted, the Commission is inclined to look with favor upon a settlement in making that determination. *See* Declaratory Ruling, 6 FCC Rcd at 7521, n.52.

20. ACCORDINGLY, we find that a *prima facie* case of a violation of the Commission's lowest unit charge requirements has been established by complainants in connection with certain advertisements aired on their behalf. The parties are hereby ORDERED to follow the procedures and timetable for discovery, post-discovery, and election of a complaint resolution procedure established herein.

21. IT IS FURTHER ORDERED, that Nationwide's motion to dismiss and complainants' motion to strike are denied.

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[8] *See Lawton Chiles, Bob Martinez, and Bill Nelson*, 8 FCC Rcd 714, 717 (MMB 1993). In this regard, we require the party seeking depositions to demonstrate with respect to *each* witness they seek to depose, that the individual's testimony is necessary to the resolution of the issues upon which discovery has been granted herein. This must include " *specific* " arguments demonstrating the necessity of the proposed testimony -- both in terms of the information sought and the use of depositions as the means of securing the necessary information -- and should be supported by documentary evidence." *Id.*

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX A

DOCUMENTS TO BE PRODUCED TO COMPLAINANTS

Certain documents shall be produced to complainants by WRIC-TV by delivering them to the offices of Robert S. Kahn, Esquire, Barnes, Browning, Tanksley & Casurella, 166 Anderson Street, Suite 225, Marietta, Georgia 30060, in accordance with the procedures outlined in this *Order*. The documents to be produced are as follows:

1) All advertising contracts executed by or on behalf of complainants in connection with the 1989 primary and general elections.

2) All invoices, logs or other documents recording time, duration, or class of advertising time for each political advertisement ordered and/or aired on behalf of complainants in connection with the 1989 primary and general elections.

3) Copies of invoices and contracts for, and program logs related to, all commercial time run on the station beginning on the 45 days preceding the 1989 primary election; and copies of invoices and contracts for, and program logs related to, all commercial time run on the station starting on the 60 days preceding the 1989 general election.

This should include:

a) All invoices, logs or other documents recording time, duration, or class of advertising time for each commercial spot aired, and, if not apparent from the preceding, documents reflecting all agency discounts provided by the station;

b) All long term contracts that pertain to commercial spots, including make goods and bonus spots, that aired during these periods;

c) All addenda or memoranda relating to these invoices or contracts that alter or otherwise address the terms or provisions of any document subject to production pursuant to this production order;

d) All orders for commercial spots aired during these periods, including confirmation orders or contracts;

e) All orders for bonus spots, public service announcements, or any other type of free spots, for any of the commercial advertisers who purchased time that ran during these periods; and

f) All documents that describe the rate and other relevant terms (those that affect price or have a direct bearing on the characteristics, such as class of time, of each spot) of discount packages sold to commercial advertisers that included spots that aired during these periods.

4) All documents used by the station to explain to its sales personnel or other employees or agents dealing with political campaigns, or the agents of political campaigns, the application of the lowest unit charge provisions of Section 315(b) of the Communications Act. This should include any written policy statement(s) used by the station in 1989 which directly or indirectly related to the station's pricing policies.

5) All documents reflecting the existence, implementation, and results of any audit of rates charged to political advertisers performed by or on behalf of the station with respect to the 1989 primary and general elections, including any provision of rebates to such political advertisers, as well as all documents explaining or detailing the methodology used by the station in performing any such audit or providing any such rebates.

APPENDIX B

ADDITIONAL INFORMATION TO BE PROVIDED TO COMPLAINANTS

Answers to the following interrogatories shall be provided to complainants in accordance with the procedures set forth in this *Order:*

1) Describe how WRIC-TV arrived at its lowest unit charge ("LUC") in 1989.

2) Detail any actions taken by WRIC-TV to ensure that political advertisers were, in fact, charged the lowest unit rate for the same class and amount of time during the same time periods which ran during the 1989 statutory LUC periods. This should include the identities of all individuals taking or participating in such action, identifying their position at the station, and should identify all documents which refer to or formed a part of the station's efforts to ensure that candidates received the LUC.

3) Provide a statement that indicates the class and length of each commercial spot, if not apparent from the program logs, invoices or contracts, that aired during the relevant time periods.

4) Provide a statement that explains any codes used by the station or its sales representatives to indicate the rate, section or class of spot identified in confirmation contracts, program logs, affidavits of actual broadcast or other documents relating to advertising rates.

APPENDIX C

TIMETABLE FOR DISCOVERY AND POST-DISCOVERY

First day of discovery period (30 days after release of this *Order):*	Day 1
Documents in Appendix A and Answers to Written Interrogatories in Appendix B due:	Day 1
Request by complainants for further discovery (production of additional documents, answers to additional written interrogatories, and/or for the taking of depositions) due:	Day 15
Opposition by station to complainants' request for further discovery due:	Day 20
Station's request for discovery (production of documents, answers to written interrogatories, and/or for the taking of depositions) due:	Day 20

Opposition by complainants to station's request for discovery due: Day 27

Documents and answers to written interrogatories (if allowed by Bureau) pursuant to station's request for discovery due: Day 45

Production of additional documents and/or answers to additional written interrogatories (if allowed by Bureau) pursuant to complainants' request for further discovery due: Day 60

Final day of discovery period: Day 60

Complainants' amended complaint due: Day 90

Station's answer to amended complaint due: Day 105

Joint notice of election of complaint resolution procedure due: Day 116

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

JOHN VAN DE KAMP, PETE WILSON,
DAN LUNGREN, ARLO SMITH,
THOMAS HAYES,

et. al

Against Station KCRA-TV
Sacramento, California

ORDER

Adopted: December 13, 1994; Released: December 23, 1994

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it a complaint filed December 8, 1992, on behalf of the following: John Van De Kamp, Pete Wilson, Dan Lungren, Arlo Smith, Thomas Hayes, Dianne Feinstein, Marian Bergeson, Leo McCarthy, Joan Milke-Flores, John Seymour, Conway Collis, and Matthew Fong (hereinafter, collectively, "Complainants"). Complainants allege that television Station KCRA-TV, Sacramento, California, overcharged them during the 1988 and/or 1990 elections in violation of the requirements of Section 315(b) of the Communications Act of 1934, as amended.[1] All of the complainants were legally qualified candidates in the State of California. Van De Kamp was a candidate for nomination for Governor in the June 5, 1990, primary election. Wilson was a candidate for Governor in the 1990 primary and November 6, 1990, general elections, and he was also a candidate for the United States Senate in the June 7, 1988, primary and November 8, 1988, general elections. Lungren and Smith were candidates for State Attorney General in the 1990 primary and general elections. Hayes was a candidate for Treasurer in the 1990 primary and general elections. Feinstein was a candidate for Governor in the 1990 primary and general elections. Bergeson was a candidate for Lieutenant Governor in the 1990 primary and general elections. McCarthy was a candidate for Lieutenant Governor in the 1990 primary and general elections, and he was also a candidate for the United States Senate in the 1988 primary and general elections. Milke-Flores and Seymour were candidates for Lieutenant Governor in the 1990 primary election. Collis was a candidate for Insurance Commissioner in the 1990 primary election; and Fong was a candidate for the Board of Equalization in the 1990 primary and general elections. The Bureau also has before it an opposition to the complaint filed on January 19, 1993, by Kelly Broadcasting Co., licensee of station KCRA-TV (hereinafter, "KCRA").

2. We have applied the guidelines set forth in *Lowest Unit Charge Requirements*, 6 FCC Rcd 7511 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992) (*"Declaratory Ruling"*), to the information submitted, and we find that complainants Van De Kamp and Hayes have established a *prima facie* case of a violation by KCRA of the lowest unit charge ("LUC") requirements of Section 315(b)(1) of the Communications Act with respect to the period immediately preceding the June 5, 1990, primary election only. We further find that complainants Wilson, Lungren, and Smith have established a *prima facie* case of a violation by KCRA of the LUC requirements with respect to the period immediately preceding the November 6, 1990 general election only. Complainants Feinstein, Bergeson, McCarthy, Milke-Flores, Seymour, Collis, and Fong have failed to establish a *prima facie* case of an LUC violation. Therefore, their complaints against KCRA will be dismissed.[2] The following is a discussion of the issues raised, and a timetable and procedures for discovery, post-discovery, and election of a procedure for resolving those portions of this complaint presenting a *prima facie* case.

Refusal to Sell

3. Complainants contend that KCRA's April 21, 1990, ratecard for political advertising is *prima facie* evidence of its refusal to sell time to political candidates at intermediate, *i.e.*, Section 2, rates. Complainants point to the following language in the ratecard:

WEEK OF 5/29-6/4: ALL SPOTS MUST BE SECTION 1 OR SECTION 3. SECTION 2 IS N/A.

Complainants allege that, during the week preceding the June 5, 1990, primary election, at least one commercial advertiser (the California Lottery) bought spots at intermediate rates. Complainants submit invoices which show that the prices paid by the California Lottery were between the Section 3 and Section 2 political candidate rates.

4. In opposition, KCRA explains that "Section 2" spots, offered only to candidates, were preemptible with one week's notice. Because it would have been impossible to

[1] Section 315(b) provides as follows:

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof. 47 U.S.C. Section 315(b).

[2] In its opposition, KCRA points out that Fong did not purchase any advertising on its station.

give candidates one week's notice of preemption for spots purchased during the week immediately preceding the election, preemptible-with-one week's-notice spots were simply not offered during that week.[3] In any event, all preemptible spots offered to commercial advertisers during the 1990 primary election LUC period were subject to immediate preemption. In this regard, KCRA states that the California Lottery only bought immediately preemptible spots, which were the equivalent of Section 3 spots for candidates. In view of the above, we conclude that commercial advertisers were not offered lower rates for the same class of time during the week preceding the 1990 primary election. Thus, complainants have not made a *prima facie* case of an LUC violation on this basis.

Overcharge Allegations

5. Complainants claim that records regarding commercial advertising indicate that KCRA overcharged candidates. Complainants note that costs for spots sold to the California Lottery on various days in May and June 1990 were less than costs for spots sold to candidate Van De Kamp in the same day parts, albeit on other days in May and June. Complainants observe that neither the invoices for the California Lottery nor those for candidate Van de Kamp identify which class of time was purchased, and, therefore, they argue that a difference in class cannot explain the differences in price. Complainants allege that, in any event, none of the California Lottery's spots were preempted. KCRA explains that the difference in cost occurred because candidate Van de Kamp bought mainly Section 1 or fixed spots while the California Lottery bought only immediately preemptible spots. In addition, KCRA states that some spots purchased by the California Lottery had indeed been preempted or moved to run during less desirable programs.

6. Complainants also rely on generally-available industry or statistical data to show that KCRA overcharged candidates. Specifically, complainants submit projections of average KCRA rates for the second and fourth quarters of 1990, based on data in Spot Cost Outlook and Projections ("SCOOP"). The comparisons reveal that SCOOP rates were less than spots bought by candidates Van de Kamp and Hayes during the 1990 primary election LUC period and that SCOOP rates were less than spots bought by candidates Wilson, Smith and Lungren during the 1990 general election LUC period. In opposition, KCRA advances various arguments which question the validity of using SCOOP to establish that overcharges occurred. KCRA also contends that the appropriate SCOOP rates differ from those cited by the complainants.

7. Complainants also claim that KCRA discriminated against candidates in its charges for 10-second spots. Complainants note that KCRA's political rate card gives a rate for 10-second announcements of 60% of the 30-second rate. Complainants submit invoices showing that, during the LUC period preceding the 1990 primary election, the California Lottery purchased 10-second spots for $600 while it paid $1200 for 30-second spots during the same daypart. In opposition, KCRA observes that none of the complainants purchased 10-second spots during either the 1990 primary or general election LUC periods.

8. To establish a *prima facie* case, a complainant must, at a minimum, submit "a short, plain statement of the claim sufficient to show that the complainant is entitled to the relief requested." *Declaratory Ruling*, 6 FCC Rcd at 7513. A complainant must describe the specific factual basis for its belief that a station has committed a violation, rather than, for example, merely making a general allegation that a station has overcharged candidates. *Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith*, 7 FCC Rcd 6661, 6662-63 (MMB), *modified*, 7 FCC Rcd 7199 (MMB), *review granted in part and denied in part*, 8 FCC Rcd 131, 132 (1992) (*"Chiles"*). In the *Declaratory Ruling*, 6 FCC Rcd at 7521, n.47, the Commission specifically endorsed the use of generally-available industry or statistical data on average rates, such as SCOOP and Spot Quotations and Data, Inc. ("SQAD"), to make a *prima facie* case of an LUC violation. As we stated in *Chiles*, 7 FCC Rcd at 6663, n.11, a *prima facie* case of an LUC violation would otherwise be difficult to make. Thus, we reject KCRA's contentions[4] that SCOOP cannot be used to establish a *prima facie* case of overcharges. Of course, if any overcharges are ultimately found, and rebates are ordered, they will be based on the difference between the rates actually charged by the station and the LUC. *Cf. Chiles*, 7 FCC Rcd at 6662, n.9 , and 6663.

9. With respect to complainants' specific factual allegations concerning spots purchased by candidate Van De Kamp, KCRA has demonstrated that the difference in prices paid by the candidate and the California Lottery was due to a difference in the class of advertising. The LUC requirements of Section 315(b)(1) are limited to advertising of the same amount of time and class. *See also* Section 73.1942(a)(1) of the Commission's Rules. By demonstrating that the price differential occurred because of a difference in the class of spots purchased, KCRA has negated the inference that an LUC violation occurred with respect to the comparison between Van de Kamp and the California Lottery.

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[3] KCRA notes that Section 2 spots could have been purchased prior to the week preceding the primary election and scheduled to run during that week.

[4] KCRA states that use of SCOOP rates is inappropriate because the SCOOP analyses make no distinction between the costs of spots that must be run at specific times or within specific programs on specific days, and less expensive spots that may be run at any time within a broad rotation, *e.g.*, 9:00 a.m. to 4:00 p.m. on any weekday. KCRA also claims that complainants' selection of a single demographic category, *i.e.*, adults ages 25-54, for cost-per-point projection is arbitrary. Moreover, KCRA argues, complainants' analysis ignores classes of spots offered specifically to political candidates, when, in fact, political candidates who paid higher rates than the SCOOP rates purchased higher priced non-preemptible spots. We believe complainants' use of SCOOP was appropriate for the intended purpose: namely, to show that average rates for KCRA tended to be lower than the rates charged certain candidates. While such a showing may fall short of establishing entitlement to rebates for LUC violations, the Commission has determined that use of SCOOP rates is sufficient to make a *prima facie* case. Moreover, with respect to the complainants' choice of a demographic category, we note that KCRA provided SCOOP data for "all households." That data virtually always supported complainants' claims that overcharges occurred. Therefore, inasmuch as a *prima facie* case of overcharges exists regardless of whether we use the SCOOP data supplied by the complainants or KCRA, we need not decide whether complainants' reliance on SCOOP data for "adults 25-54" was sufficient to establish a *prima facie* case.

10. At the same time, however, it appears that the rates paid by Van De Kamp and Hayes during the period immediately preceding the 1990 primary election almost always exceeded SCOOP rates. This is so irrespective of whether the complainants' figures or KCRA's figures are used. Moreover, it appears that the rates charged Lungren and Smith for advertising immediately preceding the 1990 general election exceeded SCOOP rates. Finally, even though Wilson apparently received rebates which lowered the rate he actually paid for advertising during the period preceding the 1990 general election, the rates he paid were higher than SCOOP rates in three dayparts. Thus, we find that complainants Van De Kamp and Hayes have established a *prima facie* case of a LUC violation with respect to rates they were charged for advertising during the period preceding the 1990 primary. We also find that complainants Wilson, Lungren and Smith have established a *prima facie* case of a LUC violation with respect to rates they were charged for advertising during the period preceding the 1990 general election.[5] However, as to the other candidates and LUC periods, the complaint fails to establish a *prima facie* case.[6]

11. Moreover, the complaint does not state, and we are unable to surmise, who among the complainants was charged more than the California Lottery for 10-second spots. The LUC is the lower of the rate shown on the rate card and the rate actually charged. *Political Primer 1984,* 100 FCC 2d 1476, 1516 (1984). Without data on the rates actually charged, it is not possible to determine the LUC or to determine whether any candidate was overcharged. Thus, complainants have not made a *prima facie* showing that any candidate was charged more for a 10-second spot than was a commercial advertiser.

Alleged Rate Discrimination

12. Complainants claim that KCRA discriminated in the advertising rates which it charged different candidates, in violation of Section 73.1941(e) of the Commission's Rules. 47 C.F.R. Section 73.1941(e). Complainants cite several examples of different rates charged two different candidates for advertising during the same day parts. However, the complaint does not indicate the length and class of the spots. In its answer, KCRA states that the difference in rates between the candidates is attributable to differences in the class of the spots. Clearly, if the spots are of different classes, rate distinctions do not amount to discrimination. Because complainants have not provided information as to class, they have failed to establish a *prima facie* case with respect to rate discrimination, and this claim will be dismissed.

Separation of Spots

13. Complainants also allege that KCRA violated the Communications Act by failing to separate spots for candidates. However, separation of spots is irrelevant to the issue of lowest unit charge. *Lawton Chiles, Bob Martinez, Bill Nelson and Jim Smith (WCIX-TV),* 8 FCC Rcd 4019, 4023 (MMB 1993).

Timetable and Procedures for Discovery

14. In the *Declaratory Ruling,* the Commission determined that, once a *prima facie* showing has been made, the complainant will be entitled to limited discovery, subject to specific conditions established by the Bureau. *See* 6 FCC Rcd at 7513-14, 7521, n.49. *See also, Chiles,* 7 FCC Rcd at 6665. Accordingly, we will allow complainants Van De Kamp and Hayes limited discovery on the issue of overcharges during the 45 days before the June 5, 1990, primary. Furthermore, we will allow complainants Wilson, Lungren, and Smith limited discovery on the issue of overcharges during the 60 days preceding the November 6, 1990, general election. The documents set forth in Appendix A to this *Order,* and answers to the written interrogatories set forth in Appendix B to this *Order,* must be served upon counsel for complainants Van De Kamp, Wilson, Lungren, Smith and Hayes (not the Commission) by KCRA on or before the first day of the discovery period, which will be 30 days after the release date of this *Order. See* Appendix C.

15. Any request for further discovery by complainants Van De Kamp, Wilson, Lungren, Smith and Hayes must contain a showing that such discovery is necessary to resolve the issue of overcharges. Any discovery request by KCRA for production of documents, answers to written interrogatories, or for the taking of depositions must demonstrate that the information requested is necessary for KCRA to respond to arguments or claims that could be made by complainants Van De Kamp, Wilson, Lungren, Smith and Hayes in their amended complaint. We emphasize that any request for depositions must also demonstrate that depositions are necessary to resolution of the issue of overcharges and include a list of The proposed deponents.[7] All discovery requests must be filed within the discovery period set forth in Appendix C. The Bureau will rule on all such requests as expeditiously as possible.

16. Documents produced by KCRA that contain proprietary information may be redacted to delete the identities of commercial advertisers, including the name of the commercial advertiser, its address and telephone number, the name(s) of any person employed by the advertiser, and the name of any media company or agency representing the commercial advertisers and any persons employed by such

[5] For purposes of our analysis we have disregarded SCOOP rates for three time periods: 6:00 -7:00 am; Noon-1:00 pm; and 5:00 -6:00 pm. KCRA argues that complainants improperly applied SCOOP averages to those time periods, which are excluded by SCOOP. Because complainants Van De Kamp, Hayes, Wilson, Lungren and Smith have shown that they were charged higher rates during time periods other than those we have disregarded, KCRA's argument has no bearing on our decision.

[6] The complaint concludes, at p. 12, that Bergeson, Hayes, Lungren, McCarthy, Smith, Van De Kamp, and Wilson are entitled to rebates of specific amounts. Nevertheless, no comparisons are provided of rates paid by Bergeson and/or McCarthy.

[7] *See Lawton Chiles, Bob Martinez, and Bill Nelson,* 8 FCC Rcd 714, 717 (MMB 1993). In this regard, we require the party seeking depositions to demonstrate with respect to *each* witness they seek to depose, that the individual's testimony is necessary to the resolution of the issues upon which discovery has been granted herein. This must include " *specific* " arguments demonstrating the necessity of the proposed testimony -- both in terms of the information sought and the use of depositions as the means of securing the necessary information -- and should be supported by documentary evidence." *Id.*

media company or agency. Where any such information is redacted, KCRA shall advise complainants Van De Kamp, Wilson, Lungren, Smith and Hayes of the type of information deleted. Further redactions will be allowed only if the information redacted is proprietary and not relevant to resolution of the complaint. Should complainants Van De Kamp, Wilson, Lungren, Smith and Hayes serve documents upon KCRA, they may redact proprietary information and so advise KCRA of the type of information deleted. Any objections to redactions that are not resolved by the parties should be submitted to the Bureau in a written pleading for resolution, along with copies of the documents at issue with the disputed information intact. As with all discovery matters, the parties should make good faith attempts to resolve any discovery disputes before presenting such a dispute to the Bureau.

17. Any documents, answers to written interrogatories, or deposition transcripts, if any, produced during discovery, and the information revealed thereby, shall not be provided to any third party other than the Commission. Copies of all documents, answers to written interrogatories, and deposition transcripts produced shall be stamped with the statement: "This document is subject to a protective order entered by the Federal Communications Commission." It shall be the responsibility of the party producing the documents, answers to written interrogatories, or deposition transcripts to affix the stamp.

18. The parties must take reasonable measures to prevent unauthorized access to the documents, answers to written interrogatories, and deposition transcripts. Access must be limited to complainants Van De Kamp, Wilson, Lungren, Smith and Hayes, the management of KCRA, their attorneys and staffs, and expert witnesses. Either party may require the other to disclose in writing the names of staff and experts who have access to documents and written information. Each party must explain to all staff and experts that the documents, answers to written interrogatories, deposition transcripts, and their contents may not be disclosed to any entity other than the Commission.

19. None of the materials produced, nor the contents thereof, may be used for any purpose other than the prosecution of the instant complaint. Each individual who is provided access to these materials is hereby required to certify in writing that he or she has personally reviewed this order and understands the limitations imposed on the signing party. No copies of materials protected by this order may be made except copies to be used by the parties identified in this paragraph. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided. Upon termination of this proceeding, including any appeals, petitions or settlement, all originals and reproductions of any protected materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the protected materials of an opposing party shall be destroyed.

20. The parties may agree to additional reasonable measures to protect the confidentiality of information as the circumstances may warrant. Such agreement should be confirmed in writing and a copy provided to the Bureau. As noted in the *Declaratory Ruling*, any failure to abide by the terms of this protective order may result in the imposition of sanctions, including dismissal of the complaint or censure, suspension, or disbarment of the attorneys involved. *See* 47 C.F.R. Section 1.24.

21. Extensions of the discovery period (Appendix C) will be granted only where extraordinary circumstances exist and the parties agree to the extension, or both parties submit declarations that serious settlement discussions are ongoing. Any deadlines within the discovery period may be changed by mutual agreement, with notification to the Bureau, as long as all discovery is completed within the required time. Service of documents, discovery requests, and any pleading which requires a ruling by the Bureau is to occur by the dates set in Appendix C, unless modified by the Bureau or by mutual agreement of the parties.

22. Within 30 days after completion of discovery, complainants Van De Kamp, Wilson, Lungren, Smith and Hayes must file an amended complaint, alleging specific facts based on the information discovered, stating the nature of the Section 315(b)(1) violation and the amounts said to be owed. After KCRA has filed its answer, the parties shall file with the Bureau their election to have the complaint resolved either by the Bureau or by Alternative Dispute Resolution.

23. Settlement of lowest unit charge claims is strongly encouraged. Although the Commission retains its discretion to determine whether additional sanctions are warranted, the Commission is inclined to look with favor upon a settlement in making that determination. *See Declaratory Ruling*, 6 FCC Rcd at 7521, n.52.

24. ACCORDINGLY, we find that a *prima facie* case of a violation of the Commission's lowest unit charge requirements has been established by complainants John Van De Kamp and Thomas Hayes in connection with advertising aired on KCRA on their behalf during the 45 days before the June 5, 1990, primary. We further find that a *prima facie* case of a violation of the Commission's lowest unit charge requirements has been established by complainants Pete Wilson, Dan Lungren and Arlo Smith in connection with advertising aired on KCRA on their behalf during the 60 days before the November 6, 1990, general election. The parties are hereby ORDERED to follow the procedures and timetable for discovery, post-discovery, and election of a complaint resolution procedure established herein.

25. We find that a *prima facie* case of a violation of the lowest unit charge requirements has not been made by complainants John Van De Kamp and Thomas Hayes with regard to the 60-day period preceding the November 6, 1990, general election. Accordingly, their claims are DISMISSED as to that time period. Moreover, we find that complainants Pete Wilson, Dan Lungren and Arlo Smith have failed to make a *prima facie* case of a violation of the lowest unit charge requirements with regard to the 45-day period preceding the June 5, 1990, primary election. Accordingly, their claims are DISMISSED as to that time period. Further, we find that a *prima facie* case with respect to a violation of the lowest unit charge requirements has not been made by complainants Dianne Feinstein, Marian Bergeson, Leo McCarthy, Joan Milke-Flores, John Seymour, Conway Collis, and Matthew Fong. Therefore, their complaint against KCRA is hereby DISMISSED. Finally, we find that complainants failed to establish a *prima facie* case with respect to allegations that KCRA refused to sell to candidates at intermediate rates, discriminated between candidates, and failed to separate spots. Thus, these claims are DISMISSED as to all complainants.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX A

DOCUMENTS TO BE PRODUCED TO COMPLAINANTS VAN DE KAMP, WILSON, LUNGREN, SMITH, AND HAYES

Certain documents shall be produced to complainants Van De Kamp, Wilson, Lungren, Smith, and Hayes by KCRA by delivering them to the offices of Barnes, Browning, Tanksley & Casurella, 166 Anderson Street, Suite 225, Marietta, Georgia 30060 in accordance with the procedures outlined in this *Order*. The documents to be produced are as follows:

1) All advertising contracts executed by or on behalf of candidates for public office in connection with the 1990 primary and general elections.

2) All invoices, logs or other documents recording time, duration, or class of advertising time for each political advertisement ordered and/or aired on behalf of candidates for public office in connection with the 1990 primary and general elections.

3) Copies of invoices and contracts for, and program logs related to: all commercial time run on KCRA-TV beginning on April 22, 1990 and running through June 5, 1990 (the 45 days preceding the relevant primary election); and all commercial time run on KCRA-TV beginning on September 7, 1990 and running through November 6, 1990 (the 60 days preceding the relevant general election).

This should include:

a) All invoices, logs or other documents recording time, duration, or class of advertising time for each commercial spot aired, and, if not apparent from the preceding, documents reflecting all agency discounts provided by the station;

b) All long term contracts that pertain to commercial spots, including make goods and bonus spots, that aired during these periods;

c) All addenda or memoranda relating to these invoices or contracts that alter or otherwise address the terms or provisions of any document subject to production pursuant to this document production order;

d) All orders for commercial spots aired during this period, including confirmation orders or contracts;

e) All orders for bonus spots, public service announcements, or any other type of free spots, for any of the commercial advertisers who purchased time that ran during this period; and

f) All documents that describe the rate and other relevant terms (those that affect price or have a direct bearing on the characteristics, such as class of time, of each spot) of discount packages sold to commercial advertisers that included spots that aired during this period.

4. All documents used by KCRA to explain to its sales personnel or other employees or agents dealing with political campaigns, or the agents of political campaigns, the application of the lowest unit charge provisions of Section 315(b) of the Communications Act. This should include any written policy statement(s) used by KCRA in 1990 which directly or indirectly related to KCRA's pricing policies.

5. All documents reflecting the existence, implementation, and results of any audit of rates charged to political advertisers performed by or on behalf of KCRA with respect to the 1990 primary and general elections, including any provision of rebates to such political advertisers, as well as all documents explaining or detailing the methodology used by KCRA in performing any such audit or providing any such rebates.

APPENDIX B

ADDITIONAL INFORMATION TO BE PROVIDED TO COMPLAINANTS VAN DE KAMP, WILSON, LUNGREN, SMITH, AND HAYES

Answers to the following interrogatories shall be provided to complainants Van De Kamp, Wilson, Lungren, Smith, and Hayes in accordance with the procedures set forth in this *Order:*

1) Describe how KCRA arrived at its lowest unit charge ("LUC") in 1990.

2) Detail any actions taken by KCRA to ensure that political advertisers were, in fact, charged the lowest unit rate for the same class and amount of time during the same time periods which ran during the 1990 statutory LUC periods. This should include the identities of all individuals taking or participating in such action, identifying their position at KCRA, and should identify all documents which refer to or formed a part of KCRA's efforts to ensure that candidates received the LUC.

3) Provide a statement that indicates the class and length of each commercial spot, if not apparent from the program logs, invoices or contracts, that aired during the relevant time period.

4) Provide a statement that explains any codes used by KCRA or its sales representatives to indicate the rate, section or class of spot identified in confirmation contracts, program logs, affidavits of actual broadcast or other documents relating to advertising rates.

APPENDIX C

TIMETABLE FOR DISCOVERY AND POST-DISCOVERY

First day of discovery period (30 days after release of this *Order):*	*Day 1*
Documents in Appendix A and Answers to Written Interrogatories in Appendix B:	Day 1
Request by complainants Van De Kamp, Wilson, Lungren, Smith, and Hayes for further discovery (production of additional documents, answers to additional written interrogatories, and/or for the taking of depositions) due:	Day 15
Opposition by KCRA to complainants Van De Kamp, Wilson, Lungren, Smith, and Hayes' request for further discovery due:	Day 20
KCRA's request for discovery (production of documents, answers to written interrogatories, and/or for the taking of depositions) due:	Day 20
Opposition by complainants Van De Kamp, Wilson, Lungren, Smith, and Hayes to KCRA's request for discovery due:	Day 27
Documents and answers to written interrogatories (if allowed by Bureau) pursuant to KCRA's request for discovery due:	Day 45
Production of additional documents and/or answers to additional written interrogatories (if allowed by Bureau) pursuant to complainants Van De Kamp, Wilson, Lungren, Smith, and Hayes' request for further discovery due:	Day 60
Final day of discovery period:	Day 60
Complainants Van De Kamp, Wilson, Lungren, Smith, and Hayes' amended complaint due:	Day 90
KCRA's answer to amended complaint due:	Day 105
Joint notice of election of complaint resolution procedure due:	Day 116

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

In the Matter of

Amendment of Part 36 of The
Commission's Rules And
Establishment of a Joint Board

ORDER

Adopted: November 30, 1994; Released: December 1, 1994

By the Chief, Common Carrier Bureau:

1. The goal of the Universal Service Fund ("USF"), as presently structured, is to promote affordable local telephone service by providing financial assistance to local exchange carriers ("LECs") serving subscribers in areas for which local loop costs exceed significantly the national average cost of a subscriber loop. To accomplish this goal, the Commission has required that interexchange carriers pay USF tariff charges to support jurisdictional expense adjustments for LECs serving high cost areas. The USF tariff charge is filed and collected by the National Exchange Carrier Association ("NECA") on the basis of information provided to NECA by all LECs.[1]

2. The USF rules have been in effect for more than eight years without major change or reevaluation. Yet during that time, the telecommunications industry has changed significantly, deploying new technologies and facing incipient competition in services previously provided on a monopoly basis. Moreover, the USF has grown considerably over the last few years, rising to approximately $725 million annually. In light of these changes, the Commission recently issued a Notice of Inquiry in this proceeding,[2] seeking comment regarding the current LEC assistance mechanisms[3] and various alternative mechanisms.

3. In conjunction with the Commission's *NOI*, we believe that it is necessary to require information from the LECs to evaluate the current assistance mechanisms and to estimate the financial effects of possible rule changes on both telecommunications providers and subscribers. Therefore, we have developed the attached data request that focuses on, but is not limited to, LEC financial information, information about LEC network facilities (including switching and loop equipment), and general information about the areas served by each LEC.

4. *LECs Subject to Data Request.* We shall require that the data request be completed by all LECs that provide "Telephone Exchange Service," as that phrase is defined in Section 3(r) of the Communications Act of 1934, as amended, 47 U.S.C. §153(r). Because LECs already retain most of the requested information pursuant to Parts 32, 36, 64, and 69 of the Commission's rules, the request will not be unduly burdensome. We direct NECA, which is charged with administering the USF under Section 69.603(c) of the Commission's rules,[4] to distribute the data request to all subject LECs. The LECs shall complete the form on electronic media using Lotus 1-2-3 software and file the data with the Commission. We shall place the collected data in the public record for review by all interested parties.[5]

5. *Response Dates for Data Request.* The data request has been subdivided into four Lotus files, and for each file separate response dates have been designated, the first of which is February 1, 1995. File One of the data request must be submitted to the Commission on or before March 1, 1995. Companies that file ARMIS data with the Commission must submit File Two of the data request on or before February 1, 1995. Companies that do not file ARMIS data with the Commission must submit File Two of the data request on or before March 1, 1995. Files Three and Four of the data request must be submitted to the Commission on or before February 1, 1995. A signed original and four paper copies of each response and one copy on 3.5" computer diskette shall be filed with the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, 20554. One paper copy and one copy of each 3.5" computer diskette must be transmitted to the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Two paper copies and two copies of each 3.5" computer diskette must be transmitted to the Accounting and Audits Division, Common Carrier Bureau, Federal Communications Commission, 2000 L Street, N.W. - Room 812, Washington, D.C. 20036, Attention: Deborah Dupont and Gary Seigel. Carriers requesting confidential treatment of designated portions of the data request must follow the procedures set forth in the data request.

6. Accordingly, pursuant to Sections 4, 5(c), 201-205, 218, and 403 of the Communications Act of 1934, as amended,[6] and Sections 0.91. 0.291, and 69.603 of the Commission's Rules,[7] it is HEREBY ORDERED that the National Exchange Carrier Association distribute to each carrier that provides "Telephone Exchange Service," as defined in Section 3(r) of the Communications Act of

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[1] *See* 47 C.F.R. §§ 36,601, 36.611, 36.613, 36.622, 36.631, 69.413, and 69.603 (1993).

[2] "Notice of Inquiry" (*NOI*), Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, FCC 94-199 (released August 30, 1994).

[3] The current assistance mechanisms addressed in the *NOI* include the USF rules as well as the rules regarding Dial Equipment Minute ("DEM") weighting, intended to assist small LECs. *See* 47 C.F.R. § 36.125 (1993).

[4] 47 C.F.R. § 69.603(c) (1993).

[5] If a respondent indicates, in accordance with the instructions contained in the data request, that responses to specific portions of the request are protected as confidential commercial or financial information, those responses will not be placed on the public record absent further findings.

[6] 47 U.S.C. §§ 154, 155(c), 201-205, 218, and 403.

[7] 47 C.F.R. §§ 0.91, 0.291, and 69.603 (1993).

1934, as amended,[8] one paper copy of the attached data request and one copy of the data request on a 3.5" diskette, using a Lotus 1-2-3 format.

7. IT IS FURTHER ORDERED, pursuant to Sections 201-205, 213, 215, 218, 219, 220(c), 221(c), 403, and 5(c) of the Communications Act of 1934, as amended,[9] and Sections 0.91 and 0.291 of the Commission's rules,[10] that every carrier that provides "Telephone Exchange Service," as defined in Section 3(r) of the Communications Act of 1934, as amended,[11] shall complete the attached Universal Service Fund Data Request using Lotus 1-2-3 software, and file its response to the data request with the Commission.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman,
Chief, Common Carrier Bureau

[8] 47 U.S.C. §153(r).
[9] 47 U.S.C. §§ 201-205, 213, 215, 218, 219, 220(c), 221(c), 403, and 155(c).
[10] 47 C.F.R. §§ 0.91 and 0.291 (1993).
[11] 47 U.S.C. §153(r).

Approved by OMB
3060-0620
Expires 10/31/95

UNIVERSAL SERVICE FUND DATA REQUEST

Purpose of Request. This data request is being issued in conjunction with the Federal Communications Commission's proceedings in CC Docket No. 80-286. The information will be used to study revisions or alternatives to the Commission's Part 36 rules governing high cost assistance and dial equipment minute weighting. See 47 C.F.R. §§36.601 through 36.641 and §36.125.

Technical Information. This data request consists of four Lotus 1-2-3 files. All four files are provided in .WK1, .WK3, and .WK4 Lotus versions. Versions prior to .WK4 will not show the shaded areas of the worksheets. Included with the .WK1 and .WK3 versions are the associated formatting files, .FMT and .FMT3. .WK4 does not require a formatting file.

All information should be submitted in hard copy form and on 3.5" computer diskettes in a Lotus format. Please use the Lotus file that corresponds to the most recent version of Lotus 1-2-3 in use by your company.

BECAUSE RESPONSES WILL BE ELECTRONICALLY COMPILED INTO A CONSOLIDATED DATABASE, DO NOT INSERT, DELETE, OR MOVE ANY ROWS, COLUMNS, OR TEXT, OR ENTER DATA INTO ANY CELLS OTHER THAN THOSE PROVIDED FOR DATA ENTRY IN THE FILES AS TRANSMITTED TO YOU.

Organization of the Data Request. The four Lotus files request the following information:

File Number One: DATAREQ. Requests included in the first Lotus file seek information regarding subscribers and rates, financial and other information about specific plant categories, usage information, information regarding revenues, return, and investment for specified services, data pertaining to study area density and other characteristics of the service area, information about regulatory programs and about various service options, and information about competitive services provided by the respondent. A separate response should be prepared for each study area.

File Number Two: USF4301. The second file requests financial information pertinent to jurisdictional separations and access charges. It is structured consistently with FCC Form 43.01. The response should contain data for the 12-month period ending December 31, 1993. A separate response should be prepared for each study area.

File Number Three: ZIPCODES. The third file requests a listing of all wire centers used to provide local telephone service in each study area, as well as the corresponding United States Postal Service zipcodes. The response should contain data as of October 31, 1994. A separate response should be prepared for each study area.

File Number Four: OPCODATA. The fourth file requests financial information at the telephone operating company level. The response should contain data as of October 31, 1994. A separate response should be prepared for each operating company.

Completion Mandatory for Specified Companies. Completion and return of this data request is mandatory for all telephone companies that provide "Telephone Exchange Service," as that phrase is defined in Section 3(r) of the Communications Act of 1934, 47 U.S.C. section 153(r).

Cost Companies. Companies that receive interstate settlements on the basis of their actual reported costs must complete all portions of the data request.

Average Schedule Companies. Companies that receive interstate settlements on an average schedule basis (see 47 C.F.R. §69.606) must complete designated portions of file number one (DATAREQ) and all of file number three (ZIPCODES). In the DATAREQ file, average schedule companies must complete all information requests found on line numbers that are underlined. In addition, average schedule companies are encouraged to supply information requested in other portions of the DATAREQ file and in file numbers two and four (USF4301 and OPCODATA).

Remarks. The "Remarks" section at the end of each file is provided for respondents to explain or describe special circumstances relevant to their responses to the data request. Entries in the "Remarks" section should reference the line number(s) of the entry to which the respondent's explanation relates. The "Remarks" section also should list all entries that contain estimated information (see "Estimates," below) and indicate whether each estimate reflects sampled information or some other basis.

Estimates. In numerous portions of the data request, respondents are allowed to estimate information for prior years. In the "Remarks" section at the end of each file, respondents should identify by line number those cells in the file that contain estimated information. For each such entry in the "Remarks" section, respondents should indicate how each estimate was made (whether on the basis of sampled data or some other method). Where the data request specifically states that estimates are allowable, estimates prepared in good faith meet the standard of accuracy required by the certification statement at the end of the data request. All estimated data should be marked with colored highlighter on each paper copy submitted.

"Not Applicable." "Not Applicable" responses should be designated by entering "N/A" in the appropriate data cell. "N/A" responses are strongly discouraged. Respondents must mark "N/A" responses with colored highlighter on each paper copy submitted. An explanation of the reason for the "Not Applicable" response must appear in the "Remarks" section of the file, specifying the line number of the response.

Treatment of Confidential Information. If a respondent considers that its response to any portion of this data request constitutes confidential commercial or financial information, the respondent should observe the following procedure: The respondent should complete the entire data request with the exception of those specific responses that are considered confidential information. This expurgated version should be filed and distributed in accordance with the instructions found in "Returning Responses," below. The respondent should then duplicate the filed computer disks and paper copy, add the confidential data, and return one full confidential copy to Deborah A. Dupont at 2000 L Street, N.W., Room 257, Washington, D.C. 20036. Each confidential disk and paper copy must be clearly marked "Confidential." In addition, the confidential disks and paper copy must be accompanied by a completed copy of the "Designation of Confidential Information" form attached to these instructions. The "Designation of Confidential Information" form must be signed by the appropriate corporate officer or agent and must list by line number all of the data responses considered confidential commercial or financial information. As to each such response, indicate whether contractual or other arrangements prevent respondent from filing the information on the public record. Copies of the "Designation of Confidential Information" form must also be filed and distributed with the expurgated data response, in accordance with the instructions found in "Returning Responses," below.

Questions. Any questions regarding the data request or problems in completing it should be communicated to Deborah A. Dupont (202-418-0873) or to Gary Seigel (202-418-0879).

Public Reporting Burden. Public reporting burden for this collection of information is estimated to average 60 to 80 hours per response for average schedule companies and 80 to 120 hours per response for cost companies, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. A separate response is required for each study area operated by a respondent. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Records Management Division, Room 234, Paperwork Reduction Project (3060-0620), Washington, D.C. 20554.

Due Date: The due date for Files Three and Four is February 1, 1995. The due date for File Two is February 1, 1995, for companies that file ARMIS data with the Federal Communications Commission, and March 1, 1995, for all other companies. The due date for File One is March 1, 1995. Responses must be returned in time to be received by all of the designated recipients (see "Returning Responses," below) on or before the designated due dates.

Returning Responses. An original and four paper copies of each response and one copy of each 3.5" computer diskette shall be filed in CC Docket No. 80-286, with the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W, Washington, D.C. 20554. One paper copy and one copy of each 3.5" computer diskette also should be transmitted to the Commission's copy contractor, International Transcription Services, Room 640, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Finally, two paper copies and two copies of each 3.5" computer diskette should be transmitted to the Accounting and Audits Division, Common Carrier Bureau, Federal Communications Commission, 2000 L Street, N.W. - Room 812, Washington, D.C. 20036, Attention: Deborah Dupont and Gary Seigel. See also "Treatment of Confidential Information," above.

DESIGNATION OF CONFIDENTIAL INFORMATION

I hereby certify that the information contained in the response(s) to the following data request(s) is protected by ___(name of company)___ as confidential commercial or financial information:

(LIST DATA REQUEST RESPONSES BY LINE NUMBER)

SIGNATURE:_____
TITLE:_____
ADDRESS:_____
_____
TELEPHONE:_____
FAX NUMBER:_____

JNIVERSAL SERVICE FUND DATA COLLECTION (File 1 of 4, filename is "DATAREQ".)

Approved by OMB
3060-0620 Expires 10/31/95

Public reporting burden for this collection of information is estimated to average 87 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Records Management Division, Room 234, Paperwork Reduction Project (3060-0620), Washington, D.C. 20554 and to the Office of Management and Budget, Paperwork Reduction Project (3060-0620), Washington, D.C. 20503.

PLEASE READ INSTRUCTIONS!

1. This Lotus 1-2-3 filename is "DATAREQ". Re-save this file under a new file name that consists of your study area's NECA code followed by "CP". For example, the study area assigned NECA code 230000, shall re-save this file as "230000CP" followed by the appropriate file extension (.WK1, .WK3 or .WK4). When completed, all files with their new names shall be returned to the FCC on a 3 1/2 inch diskette labeled with your operating company's name and the NECA study area code(s). Also provide a hard copy of each completed file.

2. A separate "DATAREQ" form (File 1 of 4) must be completed for each study area.

3. Study areas that settle interstate access on an average schedule basis are only required to complete those line numbers on "DATAREQ" that are boldfaced and underlined. Interstate average schedule study areas may complete the other sections of this data collection voluntarily.

4. Enter data or information only in those cells that are unshaded or outlined.

5. Do not insert, delete, or move any; rows, columns, or text unless approved by FCC

6. Enter remarks, if any, in the space provide at the end of this file.

7. This data collection must be signed and dated at the bottom.

8. Round all financial data to the nearest whole dollar unless otherwise indicated.

Line#

I. CARRIER IDENTIFICATION, METHOD OF REGULATION, SUBSCRIBER INFORMATION & OTHER SERVICES.

A. EXCHANGE CARRIER IDENTIFICATION.

3	Study Area Name	
4	NECA Study Area Code (six digits, enter as numeric)	
5	State or Territory of operations (do not abbreviate)	
6	COSA Code (applicable to carriers that file ARMIS	
7	reports with FCC, see 47 CFR §43.21)	
8	NECA Subset (See 47 CFR §69.602)	
9	Telephone Operating Company Name	
10	Holding Co. Name (Use highest level holding company)	
11	Contact Person	
12	Contact Person's Telephone Number	

14 Except where specified, respondents may either provide data as of year end or may calculate annual
15 averages. The same method must be consistently used for each response.
16 Please indicate here the method chosen: ("Year-End" or
17 "Average")

B. METHOD OF REGULATION.

21 Place an "X" in those cells that best describe the method(s) of regulation most applicable to
22 your study area. Your answer may require more than one "X" for each type of service. (LATA
23 is Local Access and Transport Area)

25	Basic Local Service	IntraLATA State Access	IntraLATA State Toll	InterLATA State Access	InterLATA State Toll	Interstate Access
26 Rate of Return Regulation						
27 Incentive or "Price Cap" Regulation						
28 Rate Regulation						
29 Rate increases require prior approval						
30 Other (see below)						
31 No rate regulation, rate of return						
32 regulation or incentive regulation						

33 If you selected "Other", briefly describe below the method of regulation employed:
34
35

37 Date of last application, request or

38 notification for change in local service 39 or state toll rates:	Basic Local Service	IntraLATA State Access	IntraLATA State Toll	InterLATA State Access	InterLATA State Toll
40 Month:(Spell out month, e.g. May, June)					
41 Year:					

Place an "X" in the appropriate cell to indicate whether this study area is currently average schedule or cost for: intraLATA state access and toll, interLATA state access and toll, and interstate access. If neither cost nor average schedule basis describes the relevant regulatory requirements place and "X" in the appropriate cell(s) on the line for "Other" and explain in the "Remarks" section at the end of this file.

	IntraLATA		InterLATA		Interstate
	State Access	State Toll	State Access	State Toll	Access
Cost:					
Average Schedule:					
Other					

Enter current authorized state rate of return on net investment.

Enter as a percentage rounded to two decimal places, e.g. 10.25%.
If current authorized state rate of return is a range indicate that range, e.g., 10.25% to 11.25%.
If your state does not prescribe or authorize a rate of return on net investment indicate, explain in the "Remarks" section at the end of this file.

C. SUBSCRIBER INFORMATION

Residential-Basic Local Service, Federal and State Subcriber Line Charges and Optional Services.

For customer bills during a representative month in 1994, indicate the number of residential subscribers within this study area that had total local service bills that correspond to the dollar amounts indicated on each line below. Total local service bills include flat monthly charges, extended area service charges, local usage charges, local mileage and zone charges, local information call charges, taxes, Federal and State subscriber line charges, other mandatory surcharges and optional services such as touch tone, call waiting, call forwarding, etc. Exclude carry over from prior months, connection, special construction, and deposits.

Identify the month chosen as representative. (Spell out the month, e.g., May, June, etc.) Month

	No.of Residential Subscribers Bills
Less than $4.00	
Greater than or equal to $4.00, but less than $6.00	
Greater than or equal to $6.00, but less than $8.00	
Greater than or equal to $8.00, but less than $10.00	
Greater than or equal to $10.00, but less than $12.00	
Greater than or equal to $12.00, but less than $14.00	
Greater than or equal to $14.00, but less than $16.00	
Greater than or equal to $16.00, but less than $18.00	
Greater than or equal to $18.00, but less than $20.00	
Greater than or equal to $20.00, but less than $22.00	
Greater than or equal to $22.00, but less than $24.00	
Greater than or equal to $24.00, but less than $26.00	
Greater than or equal to $26.00, but less than $28.00	
Greater than or equal to $28.00, but less than $30.00	
Greater than or equal to $30.00, but less than $33.00	
Greater than or equal to $33.00, but less than $36.00	
Greater than or equal to $36.00, but less than $39.00	
Greater than or equal to $39.00, but less than $42.00	
Greater than or equal to $42.00, but less than $45.00	
Greater than or equal to $45.00, but less than $48.00	
Greater than or equal to $48	

Average total local service bill, as defined above.

Compilation of relevant tariff sheets.

Compile but do not forward this study area's current local tariff or rate sheets showing local rates and calling scopes for this study area. Calling scope is the number of subscriber lines accessible within a toll-free local calling zone. Be prepared to forward these documents upon request.

Local Calling Area Size

The table below categorizes local calling areas according to the number of subscriber lines that can be accessed on a toll-free basis. (Extended Area Service calling is considered to be toll-free.) Provide the number of subscriber lines in your study area that are served by each category of local calling area.

Local (toll-free) calling area size based on subscriber lines	Number of Subscriber Lines
0 to 500	
501 to 1,000	
1,001 to 2,500	
2,501 to 5,000	
5,001 to 10,000	
10,001 to 25,000	
25,001 to 50,000	
Greater than 50,000	

Residential-Toll

Indicate for the categories below, the number of subscriber lines for which your telephone company provides primary billing and collecting services in this study area. (Do not include billing for incidental usage.)

	State		
	IntraLATA	InterLATA	Interstate
AT&T:			
MCI:			
Sprint:			
RBOC:			
Your company or an affiliate:			
Joint service arrangement between your company and another carrier:			
Other carriers and services:			

For customer bills during a representative month in 1994, indicate the number of residential subscribers within this study area that had total bills that correspond to the dollar amounts indicated on each line below. Total bills include local service bills, as defined above, plus toll services (including taxes on toll charges, but exclude carryover from prior months).

Identify month in 1994, chosen as representative. Spell out the month, e.g., May, June, etc. Month: _____

	No.of Residential Subscribers Bills
Less than $5.00	
Greater than or equal to $5.00, but less than $10.00	
Greater than or equal to $10.00, but less than $15.00	
Greater than or equal to $15.00, but less than $20.00	
Greater than or equal to $20.00, but less than $25.00	
Greater than or equal to $25.00, but less than $30.00	
Greater than or equal to $30.00, but less than $35.00	
Greater than or equal to $35.00, but less than $40.00	
Greater than or equal to $40.00, but less than $45.00	
Greater than or equal to $45.00, but less than $50.00	
Greater than or equal to $50.00, but less than $75.00	
Greater than or equal to $75.00, but less than $100.00	
Greater than or equal to $100.00, but less than $200.00	
Greater than or equal to $200.00, but less than $500.00	
Greater than or equal to $500.00.	

Average total bill per residential subscriber: _____

	1989	1990	1991	1992	1993
Number of residential housing units served at year end:					

Housing units include single family houses, townhouses, apartment units, condominiums, dormitory units, nursing home units, etc. Actual data must be used to calculate the number of units for 1993. Information for prior years may be estimated.

"Subscriber line": For purposes of this data request, the definition of a subscriber line is a switched communication channel between a telephone station, including PBX equipment, and the central office which serves it. The definition does not include WATS/800 access lines.

	Year End 1992	Year End 1993
Total number of residential subscriber lines, including additional subscriber lines for same housing unit:		

	Year End 1992	Year End 1993
Total number of business (including government and public telephones) subscriber lines, including additional subscriber lines for the same business:		

	1992	1993
Number of new residential subscriber line connections during year:		

(Include those residential subscribers that disconnected and then reconnected during the year)

Number of new business subscriber line connections during year, including business subscribers that disconnected and reconnected during the year: (PBX and Centrex installations should be counted on the basis of the number of subscriber lines.)

1992	1993

	1992	1993
Number of residential subscriber line disconnections during year:		

(Include those residential subscribers that disconnected and then reconnected during the year.)

	1992	1993
Number of residential subscriber line disconnections for non-payment of telephone bill:		

Does your study area experience a significant number of residential service disconnections due to seasonal factors (e.g., vacations homes, student population, etc.)? (Yes or No) [ ]

If your answer to the above question is "yes," please estimate the percentage of residential disconnections that are due to such seasonal factors and describe the specific seasonal factors in the "Remarks" section at the end of this file. Enter as percentage (%) rounded to the nearest whole percentage, e.g., 7%. [ ]

	1992	1993
Number of business subscriber line disconnections during year: (Include those business subscribers that disconnected and then reconnected during the year.)		
Number of business subscriber line disconnections for non-payment of telephone bill:		

If residential subscribers pay their basic local service bill, but fail to pay for toll calls, do you offer continued basic local service with the toll services blocked? (Yes or No) [ ]

If you answered "yes" to the above question. Enter the year this policy was instituted. [ ]

If residential subscribers pay their basic local service bill, but fail to pay for calls to "900" or "976" numbers do you offer continued basic local service with the other services blocked? (Yes or No) [ ]

If you answered "yes" to the above question. Enter the year this policy was instituted. [ ]

If residential subscribers fail to pay for local or toll service, do you offer all services blocked except for emergency "911" calls for any period of time? (Yes or No) [ ]

If you answered "yes," how long is "911" accessibility continued? Answer in number of months. [ ]

If you answered "yes" to the above question. Enter the year this policy was instituted. [ ]

Provide the total installation and connection revenues for new residential subscribers for a representative month for 1994. Include the charges for service order processing, central office work to connect the line and any separate charge for installing a drop line and connection block. Exclude inside wiring and special construction charges. (Enter in whole dollars) [ ]

Identify the month chosen as representative. (spell out month, e.g. May, June) [ ]

Number of new residential subscriber line connections during the same representative month. [ ]

Residential Revenues

For a representative month during 1994 provide the residential revenues received directly from end-users, including revenues collected on behalf of interexchange carriers for each of the below categories.

Identify the month chosen as representative. (Spell out the month, e.g., May, June, etc.) [ ]

Local service revenues:	
Federal Subscriber Line Charge revenues:	
State Subscriber Line Charge revenues:	
Intrastate toll revenues:	
Interstate toll revenues:	
Other revenues:	
Total revenues:	

Telephone Cooperatives

Is this response being completed for a cooperative telephone company. (Yes or No) [ ]

If the answer to the preceding question was "yes," complete the following:

	1992	1993
Beginning Member Equity Balance:		
Margin:		
Dividends: (including capital credits retired)		
Ending Member Equity Balance:		
Total number of members at year end:		
Total number of subscribers at year end:		

Lifeline

Number of subscribers paying reduced Federal Subscriber Line Charge or "Lifeline" Rate:

1989	1990	1991	1992	1993

(See CFR 47 §36.701-741) If your study area has a low priced local service plan called "lifeline" and it has no relationship to the Federal program do not include those subscribers in these counts.

Number of subscribers initiating service through FCC approved Lifeline Connection Assistance (Link up America):

1989	1990	1991	1992	1993

State or Local Assistance Programs (Do not include the state program that implements the Federal Lifeline program.)

Total dollar amount of assistance provided directly to your company, for this study area, from State mandated assistance programs, e.g., State USF program:

1989	1990	1991	1992	1993

Number of subscribers provided assistance, in the form of lower local rates, from state-mandated assistance programs, e.g., State Lifeline programs:

1989	1990	1991	1992	1993

Total dollar amount of state-mandated assistance programs to provide lower local rates to designated subscribers, e.g., State Lifeline programs:

1989	1990	1991	1992	1993

Number of subscribers initiating telephone service through state-mandated connection assistance programs:

1989	1990	1991	1992	1993

Total dollar amount from state mandated assistance programs to initiate telephone service to designated subscribers:

1989	1990	1991	1992	1993

Does the State government require or provide subsidies for local telephone service directly to subscribers? (Yes or No)

D. OTHER SERVICES

Indicate whether this telephone company or any of its affiliated companies provides any of the following services to the telephone subscribers of this study area. If answered "yes" to affiliated companies, provide the name(s) of the affiliated companies providing the service. "Affiliated companies" means companies that directly or indirectly through one or more intermediaries, control or are controlled by, or are under common control with your telephone company. (See 47 C.F.R. §32.9000.) In addition, if the telephone company or an affiliate is engaged in a joint venture with another company to provide the designated service, answer "yes" in the column for that service. Include all such activities, regardless of whether your telephone company or its affiliate holds a controlling interest in the entity or venture providing the service. If you wish to specify the percentage of company ownership or elaborate on respondent's relationship to the service provider, you can provide that information in the "Remarks" section at the end of this file.

	This telephone co Yes or No	Affiliated Co. Yes or No	Name of Affiliated Co.	Name of Affiliated Co.	Name of Affiliated Co.	Name of Affiliated Co.
Cable Television:						
Cellular Telephone:						
InterLATA Toll Service:						

If your company provides other telecommunications services besides local and toll services, please indicate type of services here:

If you answered "yes" regarding Cable Television, provide the Community Unit Identification Number(s) issued to your company by the FCC's Cable Services Bureau:

Are there competitive access service providers operating in your study area? (Yes or No)

Are there facilities-based competitive local telephone service providers, other than cellular telephone service providers, operating in your study area? (Yes or No)

Are there other carriers providing switched local telephone service in your study area by reselling your company's services or facilities? (Yes or No)

If telephone company or affiliate provides cable television, cellular telephone services, interLATA toll service, or other telecommunications services, to the subscribers in this study area, provide the revenues, expense, gross investment and number of subscribers for 1993.

	Revenues	Expenses	Gross Invst.	No. of Subscribers
Cable Television:				
Cellular Telephone:				
InterLATA Toll Service:				
Other				

If your telephone company or its affiliates provides cable, cellular, interLATA toll services, or other telecommunications services to the subscribers of this study area, does this study area's telephone operations share network facilities, equipment or personnel with these services? (Yes or No)

Cable Television:	
Cellular Telephone:	
InterLATA Toll Service:	
Other:	

If this study area's telephone operations share network facilities with the above services, answer "yes" or "no" for those items listed below that are shared, list other items that are shared,.and provide the amount of plant investment that was allocated among the telephone operations and other services pursuant to Part 64 of the Commission's rules (47 CFR §64.901) for the year 1993. If investment is not allocated pursuant to Part 64 of the Commission's rules, but facilities are shared pursuant to contractual or other arrangements, please describe in the "Remarks" section at the end of this file.

	Answer Yes or No for items shared	Traditional Telephone Svc Plt. Investment	Cellular Telephone Svc Plt. Investment	Cable Television Service Plt. Investment
Central Ofc. Switching				
Central Ofc.Transmission				
Cable & Wire Facilities				
Support Plant,(e.g., Buildings, Vehicles, Furniture,etc.)				
Other Facilities Shared (Briefly describe below):				

II. WORKING LOOPS, PARTY LINES AND SUBSCRIBER LINES.

"Loop" is a pair of wires, or its equivalent, between a customer's station and the central office from which the station is served.

A. Number of Total Loops at year end (Exchange Line Cable & Wire Facilities Subcategories 1.1 through 1.3):

1989	1990	1991	1992	1993

(Must agree with counts reported to NECA in the annual USF filing. If necessary, refer to NECA's Universal Service Fund Loop Count Guide for loop count definitions.)

B. Number of Subcategory 1.3 Loops at year end (exclude Subcat. 1.3 Teletypewriter Exchange Loops):

1989	1990	1991	1992	1993

"Subcategory 1.3 Loop" is a subscriber or common loop that is jointly used for local exchange service and exchange access for state and interstate interexchange services. (Must agree with counts reported to NECA in the annual USF filing. If necessary, refer to NECA's Universal Service Fund Loop Count Guide for loop count definitions.)

C. Total No. of Subscriber Lines at year end:

1989	1990	1991	1992	1993

Actual totals must be calculated for 1993. Information for prior years may be estimated.

D. Total No. of WATS/800 Access Lines at year end:

1989	1990	1991	1992	1993

E. Number of Single Party Subscriber Lines at year end:

1989	1990	1991	1992	1993

Actual totals must be calculated for 1993. Information for prior years may be estimated.

F. Number of Multi-Party Subscriber Lines Bridged inside the Central Office (C.O.) at year end:

	1989	1990	1991	1992	1993
8 or more-Party Lines:					
4-Party Lines:					
2-Party Lines:					
Total Multi-Party Lines bridged inside C.O.:					

Actual totals must be calculated for 1993. Information for prior years may be estimated.

G. Number of Multi-Party Subscriber Lines Bridged outside the Central Office at year end:

	1989	1990	1991	1992	1993
8 or more-Party Lines:					
4-Party Lines:					
2-Party Lines:					
Total Multi-Party Lines bridged outside C.O.:					

Actual totals must be calculated for 1993. Information for prior years may be estimated.

III. SWITCHES

A. Provide a count of all local switching entities including combination local/tandem switching entities categorized by the following size distribution for subscriber lines (Use most recent available data):

Subscriber lines served directly by the local switch:	Number of Local Switches: Stand Alone Switches (Serve no remotes)	Host Switches (Serve one or more remotes)	Remote Switches (Connected to network thru host)
0 to 100 Lines:			
101 to 500 Lines:			
501 to 1,000 Lines:			
1,001 to 2,000 Lines:			
2,001 to 5,000 Lines:			
5,001 to 10,000 Lines:			
10,001 to 20,000 Lines:			
20,001 to 50,000 Lines:			
Greater than 50,000 Lines:			
Total:			

B. Provide a count of all switches not serving solely as local switches:

Total Number of Tandem Switches:	
Total No. of Local/Tandem Switches:	

A local/tandem switch functions both as a local switch and a tandem switch.

C. Remote Central Office Equipment Functionality:

For the following types of remote COE units that are not located in the central office, provide the amount of gross plant investment assigned to the following Part 36 separations categories:

	Plant Investment Assigned to COE Cat 3 Switching	Plant Investment Assigned to COE Cat 4.11 CirEq.	Plant Invstmnt Assgnd to COE Cat 4.13 CirEq.	Plant Invstmnt Assigned to COE Cat 4.3 CirEq.	Plant Invstmnt Assigned to Other COE Categories
Remotes that perform "intranodal switching."*					
Remotes that do not perform "intranodal switching."					

*"Intranodal switching" occurs when the remote unit provides a switched path for communication between subscribers served by the same remote unit without a voice path (or link) to the central office host unit. A path (or link) to the host unit may be required for initial call set-up, but once established, this path is dropped and the voice path does not extend to the host unit for subscribers served by the same remote unit.

D. Switch Types

Provide the number of switches and subscriber lines served as categorized below. The number of switches shall include local, combination local/tandem and tandem switches.

	Electromechanical		Analog Electronic		Digital Electronic	
Year -End	Number of Switches	No. of Subscribe Lines Served	Number of Switches	No. of Subscriber Lines Served	Number of Switches	No. of Subscriber Lines Served
1989						
1990						
1991						
1992						
1993						

IV. DIAL EQUIPMENT MINUTES (DEM) WEIGHTING AND SEPARATIONS INFORMATION

"DEM" are minutes of holding time of originating and terminating local switching equipment.

Provide the DEM weighting factor [See 47 CFR §36.125(f)] for each of these years:

	1989	1990	1991	1992	1993
Enter 3, 2.5, 2 or 1					

Dial Equipment Minutes (DEM)	1989	1990	1991	1992	1993
Local DEM (including EAS")(thousands):					
State DEM (thousands):					
Interstate DEM (thousands):					
Total DEM (thousands):					

Local Extended Area Service DEM (thousands)					

"Extended Area Service (EAS) is a local telephone service tariff put into effect as a replacement for short-haul toll tariffs. EAS enlarges the toll-free local calling zone to include exchanges that under pre-EAS tariffs were considered to be long distance calls. For carriers that have no means of calculating or obtaining EAS minutes, estimate EAS minutes, preferably on the basis of the number of trunks. If EAS minutes are estimated, please indicate that fact in the "Remarks" section at the end of this file and whether the estimates are based on the number of trunks. If EAS estimates are not possible, please include EAS minutes with Local minutes and explain, in the "Remarks" section, why EAS estimates cannot be made.

Total COE Cat 3-Switching Equipment	1989	1990	1991	1992	1993
Plant in Service					
Accumulated Depreciation					
Accumulated Deferred Taxes					

1993 Selected Separations Data (Report in thousands)

	Total	State	Interstate
IntraLATA Toll DEM: (thousands)			

	Total	State IntraLATA	State InterLATA	Interstate IntraLATA	Interstate InterLATA
Originating Access MOU (thousands)					
Terminating Access MOU (thousands) (47 CFR §69.2(a))					

For the below four tables, report minutes of use for "Local," "State Toll," and "Extended Area Service" separately. For carriers that have no means of calculating or obtaining EAS minutes, estimate EAS minutes, preferably on the basis of the number of trunks. If EAS minutes are estimated, please indicate that fact in the "Remarks" section at the end of this file and whether the estimates are based on the number of trunks. If EAS minutes are not possible, please include EAS minutes with Local minutes and explain, in the "Remarks" section, why estimates cannot be made. The Total MOU should equal "Total Interstate MOU" plus "Total State MOU".

	Total MOU	Total Interstate MOU	Total State MOU (Include Local, StateToll & EAS)	Local MOU	State Toll MOU	Local Extended Area Service MOU
Tandem Switching Cat. 2 MOU (thousands) (47 CFR §36.124(b))						

	Total MOU	Total Interstate MOU	Total State MOU (Include Local, StateToll & EAS)	Local MOU	State Toll MOU	Local Extended Area Service MOU
Wideband and Exchange Trunk C&W Cat. 2 MOU (thousands)(47 CFR §36.155)						

	Total MOU	Total Interstate MOU	Total State MOU (Include Local, StateToll & EAS)	Local MOU	State Toll MOU	Local Extended Area Service MOU
Interexchange C&WF Cat. 3 Conversation Minute Miles (thousands)(47 CFR §36.156)						

	Total MOU	Total Interstate MOU	Total State MOU (Include Local, StateToll & EAS)	Local MOU	State Toll MOU	Local Extended Area Service MOU
Host/Remote message C&WF Cat. 4 (excl. WATS) MOU Miles(thousands) (47 CFR §36.157)						

V. CABLE AND WIRE FACILITIES & CENTRAL OFFICE TRANSMISSION EQUIPMENT

A. Provide the 1993 Total, Interstate, State, Local, State Toll and Extended Area Service (EAS) plant amounts for each of the following categories. Interstate and state plant investments amounts are after jurisdictional separations. Total Plant should equal Total Interstate Plant plus Total State Plant.

Cable & Wire Facilities	Total Plant	Total Interstate Plant	Total State Plant	State Plant: Local Plant	State Plant: State Toll Plant
Cat. 1.1 State Private Lines & WATS					
Cat. 1.2 Interstate Private Lines&WATS					
Cat. 1.3 Jointly Used Subscriber Lines					
Cat. 2 Exchange Trunk					
Cat. 3 Interexchange					
Cat. 4 Host/Remote Msg.					

Central Office Equipment-Switching	Total Plant	Total Interstate Plant	Total State Plant	Local Plant	State Toll Plant
Cat 1. Operator Systems Equipment					
Cat 2. Tandem Switching Equipment					
Cat 3. Local Switching Equipment					

Central Office Equipment-Trans.	Total Plant	Total Interstate Plant	Total State Plant	Local Plant	State Toll Plant
Cat.4.1 Exchange Circuit Equipment					
Cat.4.11 Wideband Exch. Circuit Eq.					
Cat.4.12 Exchange Trunk Circuit Eq.					
Cat.4.13 Exchange Line Circuit Eq.					
Cat.4.2 Interexchange Circuit Eq.					
Cat.4.3 Host/Rem. Msg. Circuit Eq.					

B. Cable & Wire Facilities-Sheath Miles

Provide, as measured by sheath miles, the amounts of fiber, twisted pair copper, coaxial, and other cable & wire facilities utilized in plant. A sheath mile may include multiple lines and circuits.

	1989	1990	1991	1992	1993
Fiber Plant					
Twisted Pair Copper Plant					
Coaxial Plant					
Other Plant					

C. Buried Cable & Wire Facilities

If a substantial portion of your cable & wire facilities is not buried due to topography, terrain or other geographical characteristics of the study area such as rock, ledge, or excessive moisture place an X here: [ ]

If you placed an X above, briefly describe the nature of the condition below:

[ ]

Estimate the percentage not buried due to these conditions: [ ]

If any portion of your cable & wire facilities is buried, but would be aerial if not for government standards requiring burial, place an X here: [ ]

If you placed an X above, briefly describe the nature of the gov. standards below:

[ ]

Estimate the percentage buried due to these gov. standards: [ ]

VI. DENSITY OF STUDY AREA

Square miles served by this study area. Round to the nearest whole mile. (Use latest available data.) [ ]

VII. REVENUES, RETURN AND INVESTMENT (REGULATED TELEPHONE SERVICES ONLY) Provide data based on FCC rules. We recognize that FCC rules may or may not conform to state rules.

Revenues	1989 Total	1989 State	1989 Interstate	1990 Total	1990 State	1990 Interstate
Basic local service [Acct 32.5000]:						
Network access [Acct 32.5080]:						
Long distance msg. [Acct 32.5100]:						
Miscellaneous [Acct 32.5200]:						
Total Revenues:						
Operating Expenses and Taxes						
Average Net Investment:						

Revenues	1991 Total	1991 State	1991 Interstate	1992 Total	1992 State	1992 Interstate
Basic local service [Acct 32.5000]:						
Network access [Acct 32.5080]:						
Long distance msg. [Acct 32.5100]:						
Miscellaneous [Acct 32.5200]:						
Total Revenues:						
Operating Expenses and Taxes						
Average Net Investment:						

Revenues	1993 Total	1993 State	1993 Interstate
Basic local service [Acct 32.5000]:			
Network access [Acct 32.5080]:			
Long distance msg. [Acct 32.5100]:			
Miscellaneous [Acct 32.5200]:			
Total Revenues:			
Operating Expenses and Taxes			
Average Net Investment:			

	1989	1990	1991	1992	1993
USF Expense Adjustment (actual amt. received) (See 47 CFR §§36.601-641.):					

Lifeline Support Expense Adjustment (actual amount received) (See 47 C.F.R. §§ 36.711-741.)

	1989	1990	1991	1992	1993
Lifeline Assistance received (End Use Subscriber Line Charge Waiver):					
Lifeline Connection Assistance received (Link-up America):					

Remarks: (Please indicate the line item number your remarks relate to.)

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708 **CERTIFICATION**
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710 I certify that I have been designated by the Company that serves this study area to attest to the accuracy of the information contained herein and that I have
711 examined the foregoing report and that to the best of my knowledge, information, and belief, all statements of fact contained in this report are true, correct and
712 complete and that said report is an accurate statement of the affairs of the above named respondent in respect to the data and information set forth herein.
713
714 Printed Name
715 Position
716 Signature (Sign on the hard copy you provide.)
717 Date
718 Telephone Number
719
720 (Persons making willful false statements in this report can be punished by fine or imprisonment under the Communications Act, 47 U.S.C. 220(e).).

Universal Service Fund Data Collection (File 2 of 4, filename is "USF4301".)
See File 1 of 4 for Office of Management and Budget's Public Reporting Burden Statement.

Approved by OMB
3060-0620
Expires 10/31/95

PLEASE READ INSTRUCTIONS!

1. Study areas that settle interstate access on an average schedule basis are not required to, but may voluntarily, complete this part (File 2 of 4) of the data collection.
2. This Lotus 1-2-3 filename is "USF4301". Re-save this file under a new file name that consists of your study area's NECA code followed by "AR". For example, the study area assigned NECA code 230000, shall re-save this file as "230000AR" followed by the appropriate file extension (.WK1, .WK3 or .WK4). When completed, all files with their new names shall be returned to the FCC on a 3 1/2 inch diskette labeled with the operating company's name and the NECA study area code(s). Also provide a hard copy of each completed file.
3. A separate "USF4301" form (File 2 of 4) must be completed for each study area.
4. To complete the data requested below please follow the instructions for FCC Report No. 43.01. See Order in the Matter of Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies, 5 FCC Rcd 4718 (1990). Please note that the data requested in this worksheet is not at the same level of detail as the FCC Report 43.01, i.e., columns i through l and n through q have been omitted.
5. Do not insert, delete, or move any; rows, columns, or text unless approved by the FCC.
6. Enter data in unshaded or outlined areas only.
7. Enter any remarks in the space provided (cell range B145..P168).
8. This data collection must be signed and dated at the bottom.

9. ROUND ALL DATA TO THE NEAREST WHOLE DOLLAR.

USE THE 12 MONTH PERIOD ENDING DECEMBER 31, 1993 TO COMPLETE THIS FORM.

Carriers that are Non-ARMIS filers may respond to the following rows as follows:
1. The data required on rows 1320 thru 1370 may be consolidated and entered on row 1360-All Other Non-Operating Items.
2. The data required on rows 1520 and 1530 may be consolidated and entered on row 1520-IRS Income Adjustment.
3. The data required on rows 1840 through 1885 may be consolidated and entered on row 1870-Other Deferred Credits.

Study Area Name	
NECA Study Area Code (six digits)	
State or Territory of operations (do not abbreviate)	
COSA Code (applicable to carriers that file ARMIS reports with FCC, see 47 CFR §43.21)	
NECA Subset (See 47 CFR §69.602)	
Telephone Operating Company Name	
Holding Co. Name (Use highest level holding company)	
Contact Person	
Contact Telephone Number	

43.01 Row	Part 32 Class B Account(s)	Classification (a)	Total (b)	Non-reg (c)	SNAFA and Intra-co Adjust. (d)	All Other Adjust. (e)	Subject to Separations (f)	State (g)	Interstate (h)	Interstate Total Common Line (m)	Interstate Total Traffic Sensitive (r)	Interstate Special Access (s)	Interstate Total Access (m+r+s) (t)	Interstate Billing and Collections (u)	Interstate IX (v)
		Revenues													
1010	5000	Basic Local Service		N/A						N/A	N/A		0	N/A	N/A
1020	5080	Network Access Services		N/A									0	N/A	
1030	5100	Toll Network Services		N/A									0	N/A	
1040	5200	Miscellaneous											0		
1050	Note 1	Settlements		N/A									0		
1060	5300	Uncollectibles											0		
1090		Net Revenues	0	0	0	0	0	0	0	0	0	0	0	0	0
		Expenses													
1110	Note 2	Equal Access	N/A							N/A		N/A	0	N/A	N/A
1120	6110-6410	Plant Specific											0		
1130	6510-6530	Plant Non-Specific											0		
1140	6610	Customer Operations Marketing											0		
1150	6620	Customer Operations Services											0		
1160	6710-6790	Corporate Operations											0		
1,170	6540	Access		N/A									0	N/A	
1180	6560	Depreciation/Amortization											0		
1185	Note 1	FCC Expense Adjustment	N/A	N/A	N/A	N/A	N/A	N/A					0		
1190	Note 2	Total Operating Expenses	0	0	0	0	0	0	0	0	0	0	0	0	0
		Other Operating Items													
1290	7100,7990	Other Operating Income/Losses											0		

1320	7910	Non-operating Items Inc Effect/Jurisdiction Diff.		N/A	N/A				N/A	N/A	N/A	N/A	N/A	N/A	N/A
1330	7600	Extraordinary Items											0		
1340	Note 1	AFUDC											0		
1350	Note 1	Special Charges											0		
1360	Note 1	All Other Non-operating Items											0		
1370	Note 1	FCC Non-operating Adjustment	N/A	N/A	N/A	N/A	N/A	N/A					0		
1390		Total Non-operating Items	0	0	0	0	0	0	0	0	0	0	0	0	0
1410	Note 1	Other Taxes State and Local Income											0		
1420	Note 1	Other State and Local											0		
1490	Note 1	Total Other Taxes	0	0	0	0	0	0	0	0	0	0	0	0	0
1510	7500(Nt.1)	Federal Income Taxes Fixed Charges											0		
1520	Note 1	IRS Income Adjustment		N/A									0		
1530	Note 1	FCC Taxable Income Adj.	N/A	N/A		N/A	N/A	N/A					0		
1540	Note 2	ITC Amortization											0		
1550	Note 1	FCC ITC Adjustment	N/A	N/A	N/A	N/A	N/A	N/A					0		
1590	Note 2	Net Federal Income Tax											0		
1610	Note 2	Plant-in-Service Equal Access Investment	N/A							N/A		N/A	0	N/A	N/A
1620	2110	Support Plant											0		
1630	2220	Operator Systems Equipment								N/A		N/A	0	N/A	
1640	2210	COE-Switching								N/A			0	N/A	
1650	2230	COE-Transmission											0	N/A	
1660	2410	Cable and Wire Facilities											0	N/A	
1670	2310	IOT Equipment									N/A		0	N/A	N/A
1680	2680-2690	Amortizable Assets											0		
1690	Note 2	Total Plant	0	0	0	0	0	0	0	0	0	0	0	0	0
1705	1500(Nt. 2)	Other Investments Other Jurisdictional Assets-Net		N/A	N/A					N/A	N/A	N/A	N/A	N/A	N/A
1710	2002	Property Held for Future Use											0		
1720	2003-2004	Plant Under Construction											0		
1730	2005	Plant Acquisition Adjustment			N/A								0		
1740	1402	Investment in Nonaffiliated Cos.											0		
1750	1438-1439	Other Deferred Charges											0		
1760	1220	Inventories											0		
1770	Note 1	Cash Working Capital	N/A	N/A	N/A	N/A	N/A	N/A					0		
1780	Note 1	FCC Investment Adjustment	N/A	N/A	N/A	N/A	N/A	N/A					0		
1790		Total Other Investments	0	0	0	0	0	0	0	0	0	0	0	0	0
1820	3100-3200	Reserves Accumulated Depreciation											0		
1830	3400-3600	Accumulated Amortization											0		
1840	4100,4340	Deferred FIT											0		
1850	4040	Customer Deposits											0		
1870	4360	Other Deferred Credits											0		
1880	4310,4370	All Other Reserve Items		N/A	N/A								0		
1885	Note 1	FCC Reserve Adjustment	N/A	N/A	N/A	N/A	N/A	N/A					0		
1890		Total Reserves	0	0	0	0	0	0	0	0	0	0	0	0	0
1910		Return Data Average Net Investment	N/A	N/A	N/A	N/A	0	0	0	0	0	0	0	N/A	0
1915		Net Return	N/A	N/A	N/A	N/A	N/A	N/A	0	0	0	0	0	N/A	N/A
1920		Rate of Return	N/A	N/A	N/A	N/A	N/A	N/A	0.00	0.00	0.00	0.00	0.00	N/A	N/A
1925	Note 1	FCC Ordered Refund	N/A	N/A	N/A	N/A	N/A	N/A					0	N/A	N/A
1926	Note 1	Refund Adjusted for Taxes	N/A	N/A	N/A	N/A	N/A	N/A					0	N/A	N/A
1930		Net Return Including FCC Ref.	N/A	N/A	N/A	N/A	N/A	N/A	0	0	0	0	0	N/A	N/A
1935		Rate of Return (including refund)	N/A	N/A	N/A	N/A	N/A	N/A	0.00	0.00	0.00	0.00	0.00	N/A	N/A

		Miscellaneous Data													
1950	Note 1	Lifeline Adjustment	N/A	N/A	N/A	N/A				N/A	N/A	N/A	N/A	N/A	N/A
1960	Note 1	Universal Service Fund	N/A	N/A	N/A	N/A				N/A	N/A	N/A	N/A	N/A	N/A
1970	Note 1	Common Line Supt-Long Term	N/A	N/A	N/A	N/A	N/A	N/A			N/A	N/A	0	N/A	N/A
1980	Note 1	Common Line Supt-Transitional	N/A	N/A	N/A	N/A	N/A	N/A			N/A	N/A	0	N/A	N/A

Note 1: See instructions for FCC Report 43.01.
Note 2: See Sept. 12, 1990 letter from Kenneth P. Moran, Chief, Accounting and Audits Division to Wayne Chiles, Data Reporting Task Force, United States Telephone Association.
Remarks:

CERTIFICATION

I certify that I have been designated by the Company that serves this study area to attest to the accuracy of the information contained herein and that I have examined the foregoing report and that to the best of my knowledge, information, and belief, all statements of fact contained in this report are true, correct and complete and that said report is an accurate statement of the affairs of the above named respondent in respect to the data and information set forth herein.

Printed Name	
Position	
Signature	
Date	
Telephone Number	

(Persons making willful false statements in this report can be punished by fine or imprisonment under the Communications Act, 47 U.S.C. 220(e).).

UNIVERSAL SERVICE FUND DATA COLLECTION (File 3 of 4, filename is "ZIPCODES".)
See File 1 of 4 for Office of Management and Budget's Public Reporting Burden Statement.

Approved by OMB
3060-0620
Expires 10/31/95

INSTRUCTIONS:

1. All study areas must complete this part (File 3 of 4) of the data collection.
2. This Lotus 1-2-3 filename is "ZIPCODES." Re-save this file under a new file name that consists of your study area's NECA code followed by "WC". For example, the study area assigned NECA code 230000, shall re-save this file as "230000WC" followed by the appropriate file extension (.WK1, .WK3 or .WK4). When completed, all files with their new names shall be returned to the FCC on a 3 1/2 inch diskette labeled with the operating company's name and NECA study area code(s). Also provide a hard copy of each completed file.
3. A separate "ZIPCODES" form (File 3 of 4) must be completed for each study area.
4. Do not insert, delete, or move any; rows, columns, or text unless approved by FCC.
5. Before printing this report, please change the print range to include the last row and column in which you entered information.
6. Response should be as of October 31, 1994.
7. This data collection must be signed and dated below.

CERTIFICATION

I certify that I have been designated by the Company that serves this study area to attest to the accuracy of the information contained herein and that I hav examined the foregoing report and that to the best of my knowledge, information, and belief, all statements of fact contained in this report are true, correct and complete and that said report is an accurate statement of the affairs of the above named respondent in respect to the data and information set forth herein.

Printed Name	
Position	
Signature	(Sign on the hard copy that you provide)
Date	
Tel. Number	

(Persons making willful false statements in this report can be punished by fine or imprisonment under the Communications Act, 47 U.S.C. 220(e).).

I. EXCHANGE CARRIER IDENTIFICATION.

Study Area Name	
NECA Study Area Code (six digits)	
State or Territory of operations (do not abbreviate)	
COSA Code (applicable to carriers that file ARMIS reports with FCC, see 47 CFR §43.21)	
NECA Subset (See 47 CFR §69.602)	
Telephone Operating Company Name	
Holding Company Name (Use highest level holding company)	
Contact Person	
Contact Telephone Number	

II. WIRE CENTERS AND AREAS OF SERVICE.

1. Beginning in cell A60 and continuing down in column A, enter all Wire Center Common Language Location Identifiers (CLLI) in this study area.
2. Beginning in cell B60 and continuing down in column B, enter the number of subscriber lines served by the wire center indicated on the same row in Column A.
3. Beginning in cell C60 and continuing down in column C, enter the U.S. Post Office Zip Code (five digit Zip Code only) that the Wire Center identified in on the same row in Column A is located.
4. Beginning in cell D60 and continuing to the right enter all U.S. Post Office Zip Codes in which the Wire Center identified on the same row provides telephone service. Enter one Zip Code per cell then move to the right on the same row until all Zip Codes are entered for that Wire Center. Include all partially served zip codes, if any. Follow this same procedure for each Wire Center listed in Column A.

Column A	Column B	Column C	Column D →
Wire Center Common Language Location Identifier (CLLI)	Number of Subscriber Lines Served by Wire Center	Post Office Zip Code at Location of Wire Center	All Post Office Zip Codes served by the Wire Center (Enter to the right each Zip Code served by wire center)

UNIVERSAL SERVICE FUND DATA COLLECTION (File 4 of 4, filename is "OPCODATA".)
See File 1 of 4 for Office of Management and Budget's Public Reporting Burden Statement.

Approved by OMB
3060-0620
Expires 10/31/95

PLEASE READ INSTRUCTIONS!

1. This form (File 4 of 4) shall be completed at the telephone operating company level. If a holding company owns more than one telephone operating company, a separate form shall be completed for each telephone operating company.
2. Telephone operating companies that own only study areas that settle interstate access on an average schedule basis are not required to, but may voluntarily, complete this form (File 4 of 4).
3. This Lotus 1-2-3 filename is "OPCODATA". Re-save this file under a new file name that consists of your telephone operating company's lowest numbered NECA code followed by "OD". For example, if your operating company's lowest assigned study area NECA code is 230000, you shall re-save this file as "230000OD" followed by the appropriate file extension (.WK1, .WK3 or .WK4). When completed, all files with their new names shall be returned to the FCC on a 3 1/2 inch diskette labeled with the operating company's name and NECA study area code(s). Also provide a hard copy of each completed file.
4. Do not insert, delete, or move any; rows, columns, or text unless approved by the FCC.
5. Enter data in unshaded or outlined areas only.
6. Enter any remarks in the space provided.
7. This data collection must be signed and dated at the bottom.
8. ROUND ALL DATA TO THE NEAREST WHOLE DOLLAR EXCEPT FOR PERCENTAGES.

Line#

1 **I. IDENTIFICATION**
2 Telephone Operating Company Name
3 COSA Code (applicable to carriers that file
4 ARMIS reports with FCC, see 47 CFR §43.21)
5 Holding Company Name (Use highest level holding co.)
6 Contact Person
7 Contact Telephone Number
8
9 **II. STUDY AREAS**
10 List all study areas operated by this company, as of October 31, 1994 of this data request, by name, the six digit study area NECA code, COSA
11 Code (applicable to carriers that file ARMIS reports), and the state of operation (if you need more space create a second Lotus 1-2-3 file (with a
12 different filename), enter the additional study areas and duplicate the information in sections I., III., and IV.)
13 If this company has sold or acquired all or parts of study areas during the last five years, provide information as to what was sold or acquired in
14 the "Remarks" section at the end of this file.

15	16 Study Area Name	NECA Code (six digits)	COSA Code (if applicable)	State of Operation (do not abbreviate)
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III. FINANCIAL DATA

Cash and Retained Earnings

Cash and Cash Equivilents (year end) Acct. 32.1120 (See 47 CFR §32.1120)	1989	1990	1991	1992	1993

Retained Earnings (year end) Acct. 32.4550 (See 47 CFR §32.4550)	1989	1990	1991	1992	1993

Capital Structure (Percent Equity Capital plus Percent Debt Capital must total 100%).

	1989	1990	1991	1992	1993
Percent Equity Capital:					

"Equity Capital" are funds provided by the firm's owners that do not mature at some future date. Sources of "Equity Capital" include preferred stock, common stock, and retained earnings. Total Assets minus Total Liabilities equals Equity Capital. Percent equity capital is equity capital divided by total capital.

	1989	1990	1991	1992	1993
Percent Debt Capital:					

"Debt Capital" are short or long term borrowings that are expected to be paid back at some future date. Excluded from debt capital are those sources of financing that are not investor supplied or otherwise subtracted from a carrier's ratebase. Specifically excluded are: accounts payable, accrued taxes, accrued interest, dividends payable, deferred credits and operating reserves, deferred taxes and deferred tax credits. See 47 C.F.R. §65.300(a). Percent debt capital is debt capital divided by total capital.

	1989	1990	1991	1992	1993
Embedded Cost of Debt %:					

(Please enter as % to 1 decimal place, e.g., 8.1%)

"Embedded Cost of Debt" is annual interest paid or payable plus amoritizations of discounts given or premiums received divided by the average amount of outstanding debt. Please enter as % to 1 decimal place, e.g.,8.1%.

	1989	1990	1991	1992	1993
Total company net income after taxes and after interest expense:					
Total company average stockholders equity:					

	1989	1990	1991	1992	1993
Total company net income after taxes, but before interest expense:					
Total company average net investment:					

	1989	1990	1991	1992	1993
Regulated telephone operations net income after taxes, but before interest expense:					
Regulated telephone operations average net investment:					

IV. AFFILIATED TELEPHONE OPERATING COMPANIES

List all affiliated telephone operating companies, as of October 31, 1994, by name. Affiliated companies (see 47 CFR §32.9000) are those companies that directly or indirectly through one or more intermediaries, control or are controlled by, or are under common control with the telephone operating company referred in section I above. IDENTIFICATION, Line #2. (If you need more space, create a second Lotus 1-2-3 file (with a different filename) enter the additional telephone operating companies and duplicate the information in sections I., II. and III. of this file.)

Remarks:

CERTIFICATION

I certify that I have been designated by the Company that serves this study area to attest to the accuracy of the information contained herein and that I have examined the foregoing report and that to the best of my knowledge, information, and belief, all statements of fact contained in this report are true, correct and complete and that said report is an accurate statement of the affairs of the above named respondent in respect to the data and information set forth herein.

Printed Name	
Position	
Signature	(Sign on the hard copy you provide.)
Date	
Telephone Number	

(Persons making willful false statements in this report can be punished by fine or imprisonment under the Communications Act, 47 U.S.C. 220(e)

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARLES SCHWAB & CO., INC., *et al.*
Complainants,

AT&T CORP.,
Defendant.

File No. E-92-105

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

ORDER

Adopted: October 1, 1994; Released: November 9, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. Charles Schwab & Company, Inc., Japan Air Lines - American Region, Quotron Systems, Inc., Texaco, Inc., and TRW Information Systems Group - Credit Data Division (together the Complainants) filed the above-captioned formal complaint against AT&T Corp. (then American Telephone and Telegraph Company, Inc.) The complaint was subsequently amended to add J.C. Penney Co. as a complainant. The Complainants allege, *inter alia*, that AT&T Corp. violated Sections 201 through 203 of the Communications Act, 47 U.S.C. §§ 201-203, in connection with its provisioning of certain private line services. AT&T Corp. denied the allegations and moved to dismiss the complaint. The parties subsequently entered into negotiations aimed at settling the matters in controversy. The Complainants have now filed a motion to dismiss the Amended Complaint with prejudice, with the concurrence of AT&T Corp., stating that the parties had reached a mutually satisfactory settlement.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and expenditure of additional time and resources by the parties and the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the motion filed by Charles Schwab & Company, Inc., Japan Air Lines - American Region, Quotron Systems, Inc., Texaco, Inc., TRW Information Systems Group - Credit Data Division, and J.C. Penney Co., to dismiss the above-captioned formal complaint against AT&T Corp. IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned formal complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FCC 94-212

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	GN Docket No. 93-252
Implementation of Sections 3(n) and 332 of the Communications Act	)	
	)	
Regulatory Treatment of Mobile Services	)	
	)	
Amendment of Part 90 of the Commission's Rules To Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144
	)	
Amendment of Parts 2 and 90 of the Commission's Rules To Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool	)	PR Docket No. 89-553

THIRD REPORT AND ORDER

Adopted: August 9, 1994; Released: September 23, 1994

By the Commission:

TABLE OF CONTENTS

Paragraph

I. INTRODUCTION 1

II. BACKGROUND 2

III. DISCUSSION 4

A. EXECUTIVE SUMMARY 4

1. Substantially Similar Services 10
2. Comparable Technical and Operational Rules 15

a. Service Area and Channel Assignment Rules 15
b. Other Technical and Operational Rules 15

3. Spectrum Aggregation Limit 16
4. Licensing Rules and Procedures 20

B. COMPARISON OF RECLASSIFIED PART 90 SERVICES AND "SUBSTANTIALLY SIMILAR" COMMON CARRIER SERVICES 22

1. Summary 22
2. Background and Pleadings 29
3. Discussion 37

a. Examination of Competition 37
b. Comparison of Services 51

C. TECHNICAL AND OPERATIONAL RULES 80

1. Technical Rules 84

a. Channel Assignment and Service Area 84
b. Co-Channel Interference Protection 130
c. Antenna Height and Transmitter Power Limits 146
d. Emission Masks 158
e. Modulation and Emission Requirements 162
f. Interoperability 165

2. Operational Rules 169

a. Construction Period and Coverage Requirements 169
b. Loading Requirements 185
c. User Eligibility 196
d. Permissible Uses 201
e. Station Identification 210
f. General Licensee Obligations 220
g. Equal Employment Opportunities 227

D. SPECTRUM AGGREGATION LIMIT 238

1. Spectrum Caps Generally 238

a. Background and Pleadings 238
b. Discussion 248

2. Scope of Spectrum Cap 252

a. Background and Pleadings 252
b. Discussion 258

3. Services Excluded from Cap 266

a. Narrowband Radio Services 266
b. Satellite Services 268

4. Implementation Issues 270

a. Maximum Attributable SMR Spectrum 270
b. Attributable Cross-Ownership 276
c. Designated Entities 278
d. Geographic Attribution 279
e. Calculation of Attributable SMR Spectrum 280
f. Timing 283

E. LICENSING RULES AND PROCEDURES 286

1. Application Forms and Procedures 286

a. Background and Pleadings 286
b. Discussion 293

2. Qualifying Information 300

a. Background and Pleadings 300

b. Discussion 304

3. Application Fees 307

a. Background and Pleadings 307
b. Discussion 310

4. Regulatory Fees 311

a. Background and Pleadings 311
b. Discussion 314

5. Public Notice and Petition to Deny Procedures for CMRS Applications 316

a. Background and Pleadings 316
b. Discussion 318

6. Mutually Exclusive Applications; Competitive Bidding 322

a. General Background and Conclusions 322
b. Part 22 Services 330
c. 900 MHz SMR 335
d. 800 MHz SMR 338
e. 220 MHz 343
f. 929-930 MHz Paging 346

7. Amendment of Applications and License Modification 348

a. Definitions 348
b. Mutual Exclusivity 360
c. Minor Modifications 368

8. Conditional and Special Temporary Authority 374

a. Pre-Grant Construction 374
b. Pre-Grant Operation 378

9. License Term; Renewal Expectancy 385

a. Background and Pleadings 385
b. Discussion 386

10. Assignment of Licenses and Transfer of Control 388

a. Background and Pleadings 388
b. Discussion 392

11. Combined PMRS and CMRS Operation 399

a. Background and Pleadings 399
b. Discussion 402

12. Conversion to CMRS Status by Existing Part 90 Licensees 403

a. Background and Pleadings 403
b. Discussion 408

IV. PROCEDURAL MATTERS AND ORDERING CLAUSES 412

APPENDICES

A. Mobile Services Application Form and Schedules
B. Amendments to Title 47, Code of Federal Regulations
C. Final Regulatory Flexibility Analysis
D. List of Pleadings in GN Docket No. 93-252
E. List of Pleadings in PR Docket No. 93-144
F. List of Pleadings in PR Docket No. 89-553

I. INTRODUCTION

1. In this Third Report and Order, we complete the initial implementation of Sections 3(n) and 332 of the Communications Act of 1934,[1] as amended by Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993.[2] As required by Congress, we adopt changes to our technical, operational, and licensing rules for common carrier and private mobile radio services that are necessary to implement the statute and to establish regulatory symmetry among similar mobile services. The establishment of this regulatory framework also sets the stage for the future evolution of mobile services. In this respect, the rules we adopt today mark an important step in our continuing effort to enhance competition among mobile services providers, promote the development of new and technologically innovative service offerings, and ensure that consumer demand, not regulatory decree, dictates the course of the mobile services marketplace.

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[1] Communications Act of 1934, 47 U.S.C. §§ 151-713 ("Communications Act" or "Act").

[2] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312, 392 (1993) (Budget Act).

II. BACKGROUND

2. In the *CMRS Second Report and Order* in this docket, we initiated the process of implementing the Budget Act amendments to Sections 3(n) and 332 of the Act by interpreting the statutory definitions of "commercial mobile" radio service (CMRS) and "private mobile" radio service (PMRS).[3] We determined that Congress intended the CMRS classification to apply to all mobile services that are for profit and that provide interconnected service to the public or a substantial portion of the public. Applying this definition to our existing mobile services, we found that all common carrier mobile licensees and certain private radio licensees in the Specialized Mobile Radio (SMR), Business Radio, 220-222 MHz, and private paging services, regulated under Part 90 of the Commission's Rules, fell within the CMRS classification.[4] While we determined in the *CMRS Second Report and Order* that Part 90 licensees meeting the CMRS definition would be reclassified as CMRS providers, we deferred numerous other issues relating to the regulation of these reclassified licensees for a subsequent proceeding.[5]

3. Following the *CMRS Second Report and Order*, we adopted a Further Notice of Proposed Rule Making on April 20, 1994, to address pending issues relating to the implementation of the statute.[6] In particular, we sought to address the impact of the amended statute on our technical, operational, and licensing rules for all mobile services, and particularly on the rules affecting those Part 90 services that were reclassified as CMRS by the *CMRS Second Report and Order*. As required by Section 6002(d)(3) of the Budget Act, we proposed to amend these rules to the extent necessary to ensure that competing mobile

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[3] Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994) (*CMRS Second Report and Order*), Erratum, 9 FCC Rcd 2156 (1994).

[4] *Id.* at 1448-58 (paras. 82-109).

[5] The Budget Act sets forth a specific timetable for transition to the new regulatory structure. The statute establishes a one-year period from the date of enactment, *i.e.*, until the close of August 9, 1994, for us to make such changes to our existing service rules as are necessary to implement the amendments to Section 332 and to provide for an orderly transition. Budget Act, § 6002(d)(3). The statute also provides that for three years from the date of enactment, *i.e.*, until the close of August 9, 1996, existing private land mobile licensees that are reclassified as CMRS providers will continue to be regulated as private service providers. *Id.*, § 6002(c)(2)(B). Although some existing licensees in the described Part 90 services will be treated as PMRS providers for three years, the provisions of Section 332(c)(6) (foreign ownership) are immediately applicable to all reclassified licensees. *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, First Report and Order, 9 FCC Rcd 1056 (1994).

[6] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Further Notice of Proposed Rule Making, 9 FCC Rcd 2863 (1994) (*Further Notice*).

services would be subject to comparable regulatory requirements, and that inconsistencies in our regulation of substantially similar services would be eliminated to the extent practical. We indicated that we would act on our proposals not later than the August 9, 1994, deadline established by Congress for adoption of rules implementing the statute.[7] On May 19, 1994, we revised the *Further Notice* on our own motion to seek comment on the additional issue of whether the amount of spectrum that CMRS licensees may aggregate in a given geographic area should be limited.[8] We received 61 comments and 70 reply comments in response to the *Further Notice*.[9]

III. DISCUSSION

A. Executive Summary

4. Last year, in the Budget Act, Congress created the CMRS regulatory classification and mandated that similar commercial mobile radio services be accorded similar regulatory treatment under the Commission's Rules. The broad goal of this action is to ensure that economic forces -- not disparate regulatory burdens -- shape the development of the CMRS marketplace.

5. The Budget Act directs the Commission to take certain steps toward that goal not later than August 9, 1994. These steps include revising our rules to ensure that services reclassified as CMRS by the Budget Act are "subjected to technical [and operational] requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common carrier services." We also must adopt rules for licensing CMRS, including reclassified services, pursuant to the radio common carrier licensing provisions of the Act. Finally, the Budget Act mandates that the Commission take appropriate steps to ensure an orderly transition to the new CMRS regulatory structure.[10]

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[7] *See* Budget Act, § 6002(d)(3).

[8] *See Further Notice*, 9 FCC Rcd at 2881-85 (paras. 86-105).

[9] *See* Appendix D for a list of pleadings and the short form references used to cite commenters. We will grant the motion of E.F. Johnson to accept its late-filed comments. Range Corporation d/b/a Range Telecommunications, an AMTA member, has filed an emergency petition to strike AMTA's comments and reply comments on the grounds that AMTA's support of the Nextel proposal does not represent the views of the SMR industry. Emergency Petition to Dismiss Comments and Reply Comments of the American Mobile Telecommunications Association, filed July 21, 1994. AMTA has opposed the petition. The arguments made by Range do not constitute reasons for the Commission to strike AMTA's filing, accordingly, we will deny Range's emergency petition. We do note that numerous members of the SMR industry, both large and small, have commented on Nextel's proposal in this proceeding and have expressed a wide diversity of views.

[10] Budget Act, § 6002(d)(3).

6. In this Order we take four steps to implement both the broad goal of the Budget Act and the more narrowly focused requirements generated by its August 9, 1994, transition deadline. First, in Section III.B., *infra,* we determine which reclassified services are "substantially similar" to existing common carrier services in order to implement the Budget Act requirement that such services be subject to "comparable" regulation. Second, in Section III.C., *infra,* we revise Part 90 and Part 22 technical and operational rules governing those services to ensure that the rules are, indeed, "comparable."

7. Third, in Section III.D., *infra,* to effectuate the broad congressional goal of ensuring that competition shapes the development of the CMRS market, we adopt rules that cap at 45 MHz the total amount of combined broadband personal communications services (PCS), cellular, and SMR spectrum in which an entity may have an attributable interest in any geographic area.

8. Fourth, in Section III.E., *infra,* to carry out Budget Act requirements concerning the licensing of CMRS services, we are adopting uniform rules for licensing CMRS services, including reclassified services. We are also modifying our licensing rules for Part 22 CMRS and Part 90 commercial services, where appropriate, to adopt filing windows for the filing of competing initial applications and conclude that competitive bidding procedures should be used to select from among mutually exclusive applications. Moreover, as we tentatively concluded in the *Further Notice*, we are taking the additional step of adopting a single, uniform application form for use by all CMRS and PMRS applicants in all terrestrial mobile services.

9. For the convenience of the reader, we summarize in the following section the principal decisions we are adopting in connection with each of the four actions taken in this Order. Before doing so, it is important to note that while all the rules adopted in this Order become effective on January 2, 1995, some of those rules do not apply immediately to the reclassified CMRS entities that will continue to be treated as private carriers under the grandfathering provisions of the Budget Act.[11] Specifically, until the grandfathered period ends on August 9, 1996, with regard to existing licensees, such entities will not be subject to technical, operational, or licensing rule changes made in this Order that apply exclusively to CMRS. Instead, they will be subject to regulation as private carriers under Part 90 of our Rules. Grandfathered carriers should note, however, that they are governed by modifications to our rules we make in this Order that are applicable to private carriers.

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[11] As discussed in the *CMRS Second Report and Order*, those entities are: (1) private land mobile licensees who have been reclassified as CMRS providers but were licensees in that service on or before August 9, 1993; and (2) private carrier paging licensees operating on frequencies allocated as of January 1, 1993, for private land mobile services, regardless of when they were licensed. (For ease of reference, these entities generally are referred to as "grandfathered carriers" in this Order.) Nothing in this Order alters our determinations in the *CMRS Second Report and Order* concerning the scope and effect of the grandfathering provision of the Budget Act.

1. *Substantially Similar Services*

10. We establish in this Order the framework for implementing the mandate of the Budget Act that we revise our rules to the extent necessary and practical to ensure that providers of reclassified CMRS services are subjected to technical and operational rules comparable to those that apply to providers of substantially similar common carrier services. To that end, our initial task is to identify reclassified CMRS services that are ''substantially similar'' to common carrier services.

11. The goals of the Budget Act serve as our guideposts for this task: (1) to create a level regulatory playing field for CMRS; (2) to establish an appropriate level of regulation for the administration of CMRS; (3) to resolve ''substantial similarity'' issues with a view toward ensuring that unwarranted regulatory burdens are not imposed on reclassified CMRS providers; and (4) to promote the economic goals we discussed in the *CMRS Second Report and Order*, including fostering economic growth, promoting investment in mobile telecommunications infrastructure, and enabling access to the national information superhighway.

12. Based on these goals, we conclude that the appropriate analytical framework for determining whether services are substantially similar is to assess whether licensees in those services actually or potentially compete to meet the needs and demands of consumers. We conclude that all reclassified private mobile radio services actually compete, or have the potential to compete within a reasonable time period, with existing commercial mobile radio services. In other words, we conclude that all CMRS -- including one-way messaging and data, and two-way voice, messaging, and data -- are competing services or have the reasonable potential to become competing services in the CMRS marketplace. Thus, on the basis of this competitive analysis, we find that all reclassified private services are substantially similar to existing commercial services, for purposes of Section 332 of the Communications Act.

13. This broad reading of the term ''substantially similar'' furthers the statutory purposes of promoting uniformity in CMRS regulation and, thereby, minimizes the potentially distorting effects of asymmetrical regulation. This reasoning also comports with our analysis of current and likely future competition in the CMRS marketplace. Actual competition among certain CMRS services exists already and, more importantly, the potential for competition among all CMRS services appears likely to increase over time due to expanding consumer demand and technological innovation. Such conditions argue for defining the class of ''substantially similar'' services expansively, at least for the limited purpose of establishing baseline technical and operational rules.

14. It is worth emphasizing the determinative relationship between the forward-looking policy goals embodied in the rule comparability requirement of the Budget Act and our assessment of competitive trends in the CMRS marketplace. Thus, we begin in this Order with our conclusion that mobile services will be treated as substantially similar if they compete against each other. Next, we have chosen to take an expansive view of the present

condition of competition among services in the CMRS marketplace, and of the potential for competition among these services in the future, because such a view maximizes the range of services that can be considered to be substantially similar. This in turn leads us to conclude that, to the extent practical, technical and operational rules should be comparable for virtually *all* existing and reclassified CMRS services. This conclusion furthers our policy objective of ensuring a level regulatory playing field for CMRS. We note, however, that an analysis performed in the context of a different set of policy goals, or application of the same policy goals to different circumstances, may result in different conclusions regarding the extent of competition.

2. *Comparable Technical and Operational Rules*

15. Our determination that actual and potential competition among CMRS services makes them "substantially similar" for purposes of Budget Act analysis carries over into our assessment of technical and operational rules. Simply put, we conclude that differences between rules governing actually or potentially competitive services should be conformed if we determine that the differences distort competition by placing unequal regulatory burdens on different classes of CMRS providers. Such conformity between rules will not be imposed, however, if we determine that, although the relative burdens imposed by the rules may not be identical, the cost of conforming the rules outweighs the benefit that might be gained thereby. Pursuant to this analytical framework, our principal determinations are as follows.

a. Service Area and Channel Assignment Rules

- *800 MHz SMR*: We adopt the principle that 800 MHz SMR systems should be licensed on a Major Trading Area (MTA) basis to the extent feasible, but request further comment on the specifics of licensing such systems to ensure that the interests of both existing licensees and potential entrants are taken into account. We will shortly issue a further notice of proposed rule making in our 800 MHz docket (PR Docket No. 93-144) regarding: (1) designating 200 contiguous SMR channels for MTA licensing based on 50-channel blocks; (2) continuing to license the remaining 80 SMR channels under existing rules; and (3) allowing incumbents to continue operating on existing channels. We decline to adopt a proposal by Nextel that certain 800 MHz incumbents be subject to mandatory retuning to new frequencies, but we will seek further comment on this issue. We further conclude that both existing SMR licensees and new entrants will be eligible for MTA licenses, with licensees to be selected by auction in the event of mutually exclusive applications. Finally, we conclude that in light of the fundamental changes to be implemented in 800 MHz licensing, we are suspending the acceptance of all new 800 MHz SMR applications, as of August 9, 1994.

- *900 MHz SMR*: We adopt MTA-based licensing of all 200 channels in blocks of 10 channels. We conclude that eligibility for MTA licenses will be open to existing licensees and new entrants, with competitive bidding to be used in the event of mutually

exclusive applications. Incumbent licensees who do not obtain MTA licenses will be entitled to continue operating under existing authorizations.

- *220 MHz Commercial Service*: We conclude that service area definitions and channel assignment rules applicable to licensing of 220 MHz systems should not be changed at this time. We will address such issues in a separate, future rule making proceeding.

- *Private Carrier Paging*: We adopt no conformance changes to existing Part 90 and Part 22 paging rules in this docket. In the *Part 22 Rewrite Order*,[12] we concluded that the concept of wide-area licensing of 931-932 MHz paging has merit but requires further study and comment. In the 929-930 MHz paging band, we are implementing the licensing system recently adopted in the *900 MHz PCP Exclusivity Order*,[13] which allows applicants to earn exclusivity for their systems on a local, regional, or nationwide basis, depending on system size and configuration. We will therefore defer further action until we examine the question of wide-area licensing and whether further conforming of our rules is feasible.

b. Other Technical and Operational Rules

- We conclude that no fundamental changes should be made to existing rules regulating co-channel interference, adjacent channel interference, or antenna height and transmitter power.

- We conclude that new interoperability requirements will not be adopted for CMRS equipment at this time, but we are retaining the existing interoperability rule applicable with regard to cellular service. We intend to explore the question of interoperability requirements for CMRS equipment in a future inquiry.

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[12] Revision of Part 22 of the Commission's Rules Governing the Public Mobile Service, CC Docket No. 92-115, Amendment of Part 22 of the Commission's Rules To Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-Common Carrier Service, CC Docket No. 94-46, Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service, CC Docket No. 93-116, Report and Order, FCC 94-201, adopted Aug. 2, 1994 (*Part 22 Rewrite Order*). Unless otherwise noted, all citations in this Order to Part 22 rules will reference the rules that are scheduled to take effect on January 1, 1995. Any reference to a Part 22 rule currently in effect will include a parenthetical noting that the citation is to the "current rule."

[13] Amendment of the Commission's Rules To Provide Exclusivity to Qualified Private Paging Systems at 929-930 MHz, PR Docket No. 93-35, Report and Order, 8 FCC Rcd 8318 (1993) (*900 MHz PCP Exclusivity Order*), *recon. pending*.

- We adopt a uniform 12-month construction requirement for all CMRS licensees, except in instances in which the rules specify a longer period for systems of greater size or complexity.

- We eliminate loading requirements for CMRS, except that incumbent 900 MHz SMR licensees must meet current requirements for retaining channels at renewal.

- We adopt rules allowing a multi-station CMRS system to use a single call sign for station identification purposes.

- We eliminate existing user eligibility restrictions that prevent SMR, private carrier paging, Business Radio, and commercial 220 MHz licensees from providing service to foreign governments and their representatives. We also eliminate eligibility restrictions that prevent Business Radio licensees from providing service to individuals. We also eliminate the Part 90 restriction on common carrier communications for reclassified CMRS services.

- We apply existing Equal Employment Opportunity requirements to all CMRS licensees.

3. *Spectrum Aggregation Limit*

16. In this Order, we address the issue of imposing a cap on the amount of CMRS spectrum a licensee may aggregate in a given geographic area as a means of preventing potentially anticompetitive aggregation of CMRS spectrum. We conclude that to preserve competitive opportunities in the CMRS marketplace, it is unnecessary to establish, in addition to existing CMRS spectrum aggregations limitations, the broad CMRS spectrum cap proposed in the *Further Notice*. Rather, we conclude that our goals will be achieved by capping at 45 MHz the total amount of PCS, cellular, and SMR spectrum in which an entity may have an attributable interest in any geographic area. We adopt this cap as a minimally intrusive means of ensuring that the mobile communications marketplace remains competitive and retains incentives for efficiency and innovation.

17. We also reach the following determinations with regard to implementation of the spectrum cap. First, we conclude that various encumbrances on SMR spectrum *vis-à-vis* cellular or broadband PCS should be accounted for when measuring SMR spectrum for purposes of the cap. Therefore, we will attribute to an entity a maximum of 10 MHz of SMR spectrum, including both 800 and 900 MHz spectrum for purposes of determining compliance.

18. Second, we adopt a 20 percent cross ownership attribution rule for licensees other than designated entities.[14] Thus, when an entity other than a designated entity has a 20 percent or greater ownership interest in an SMR, cellular, or PCS license in a particular geographic area, the entire amount of spectrum associated with that license will be attributed to that entity for spectrum cap purposes. For designated entities, the attribution level will be a 40 percent or greater ownership interest.

19. Third, to compute an SMR spectrum total in a given market, the licensee must identify all attributable 800 MHz and 900 MHz SMR base stations located inside the MTA or BTA. All 800 MHz and 900 MHz channels located on at least one of those base stations count as 50 kHz and 25 kHz, respectively. This total can be reduced using a 10 percent population overlap test similar to that used for the current cellular-PCS spectrum cap.

4. *Licensing Rules and Procedures*

20. Section 332 of the Act, as amended by the Budget Act, provides that CMRS providers are to be "treated as common carriers for purposes of [the] Act." We conclude that this means, among other things, that all CMRS applications must comply with common carrier licensing procedures enumerated in Title III of the Act. Thus, we adopt rules that implement those procedures with regard to existing licensees and future applicants on SMR, Business Radio, 220 MHz, and Part 90 paging frequencies who provide or propose to provide service that meets the CMRS definition.

21. In particular, the following presents a partial list of measures we are adopting to ensure that CMRS applications under Part 90 comply with the statutory requirements for licensing of common carriers under Title III of the Act, as well as to streamline and unify processing of all CMRS and PMRS applications.

- *Application Forms and Procedures* -- We adopt a single unified application form (Form 600) for all CMRS and PMRS applicants in all terrestrial services. Form 600 will also be used to determine the regulatory classification of an applicant.

- *Qualifying Information* -- All parties to a CMRS application will be required to comply with the alien ownership restrictions of Section 310(b) of the Act and must also disclose whether: (1) any party has had a Commission license or permit revoked; (2) any party has been found by a court to have monopolized radio communication; or (3) any party has been convicted of a felony.

- *Application Fees and Regulatory Fees* -- Currently, application fees can only be changed by Congress. Therefore, the existing application fee schedule will continue to govern fee

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[14] Designated entities are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies. *See* 47 CFR §§ 1.2110, 24.720.

requirements. If, however, Congress acts to extend to the Commission authority to modify the fee schedules, we will address the question of altering our regulatory fees at that time.

- *Public Notice and Petition To Deny Procedures* -- We adopt rules that apply the public notice and petition to deny procedures currently contained in Part 22 to all CMRS applicants. In addition to applications for initial licenses, these procedures will extend to applications for major modifications and for assignments and transfers of Part 90 CMRS licenses.

- *Mutually Exclusive Applications and Competitive Bidding* -- We adopt rule changes that will generally result in using 30-day notice and cut-off procedures and competitive bidding to select among mutually exclusive initial CMRS applications in Part 22 services (except for Phase I cellular unserved area applications), 900 MHz SMR service, and 800 MHz SMR service. For Phase I cellular applications we adopt a one-day filing window, concluding that such a window is sufficient because there is a date certain on which applications for unserved areas are permitted to be filed. We adopt no changes to application procedures for 929-930 MHz paging in Part 90, but note that some procedural changes are likely to be considered in the future.

- *Amendment of Applications and License Modification* -- We adopt rule changes that conform Part 22 and Part 90 definitions for initial applications and major and minor amendments and modifications, to the extent practicable. Modification applications will be accepted for filing on a first-come, first-served basis.

- *Conditional and Special Temporary Authority* -- We conclude that the waiting period for pre-grant construction for Part 22 CMRS should be reduced from 90 to 35 days, and we establish a 35-day waiting period for all CMRS. We also determine that Section 309(f) of the Act prohibits pre-grant operation under special temporary authority (STA) except in those cases in which the applicant establishes that there are ''extraordinary circumstances'' where a delay in operations would seriously prejudice the public interest.

Against this background, we now turn to a detailed discussion of the issues presented in this docket.

B. Comparison of Reclassified Part 90 Services and "Substantially Similar" Common Carrier Services

1. *Summary*

22. In this section, we establish the framework for implementing the Budget Act's mandate that CMRS licensees in reclassified services must be governed by technical and operational rules that are comparable to the like rules that apply to licensees providing

substantially similar common carrier services. To that end, our initial task is to identify the formerly private mobile services that are ''substantially similar'' to common carrier services.

23. Our guideposts for determining substantial similarity are the goals we have applied in establishing the CMRS classification. Our first goal is to create a symmetrical regulatory framework for commercial mobile radio services in order to foster economic growth and expanded service to consumers through competition. As explained in the *Further Notice,* Congress created CMRS as a new classification of mobile services to ensure that similar mobile services are accorded similar regulatory treatment.[15] Second, consistent with that objective, the Commission's role is to establish an appropriate level of regulation for the administration of CMRS.[16] Such a regulatory regime will ensure that the marketplace -- and not the regulatory arena -- shapes the development and delivery of mobile services to meet the demands and needs of consumers, except where relying on market forces might lead to a result that is harmful to competition or to consumers.[17] Third, we resolve issues regarding ''substantial similarity'' in this Order with a view toward ensuring that unwarranted regulatory burdens are not imposed on any Part 90 licensees who have been reclassified as commercial carriers.[18] Finally, our decisions in this Order regarding ''substantial similarity'' are intended to promote the economic goals and objectives we discussed in the *CMRS Second Report and Order*, including fostering economic growth, promoting investment in mobile telecommunications infrastructure, and expanding access to the national information superhighway.[19]

24. Based on these goals, we conclude that services should be considered substantially similar if they compete[20] or have the reasonable potential, broadly defined, to compete in meeting the needs and demands of consumers. We believe that this characterization is the

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[15] *Further Notice,* 9 FCC Rcd at 2866-67 (para. 13).

[16] *CMRS Second Report and Order*, 9 FCC Rcd at 1418 (para. 14).

[17] *Further Notice,* 9 FCC Rcd at 2866 (para. 12).

[18] *See CMRS Second Report and Order,* 9 FCC Rcd at 1418 (para. 15).

[19] *See id.* at 1419-22 (paras. 18-29).

[20] *Further Notice,* 9 FCC Rcd at 2866-67 (para. 13). We recognize that the extent to which commercial mobile radio services are able to compete against each other is affected to some degree by regulatory restrictions. For example, current rules restrict the offering of dispatch service by cellular carriers. *See* Section 22.911(d) of the Commission's Rules, 47 CFR § 22.911(d) (current rule); *but see* Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications, GN Docket No. 94-90, Notice of Proposed Rule Making, FCC 94-202 (released Aug. 11, 1994)(*Dispatch Notice*). We are mindful of the need to exercise care in making ''substantial similarity'' determinations in this Order to take into account possible distortions in the competitive marketplace produced by current rules.

surest and most reasonable means of achieving our objectives in this rule making. As we discuss in greater detail below,[21] we have chosen this approach over suggestions that substantial similarity should be judged by technical differences among services because, to the extent that such technical distinctions result from previously disparate regulatory requirements, it is the purpose of the statute and the intent of the Commission to eliminate such disparities to the extent practical.

25. Considering the potential for competition likewise accords with our understanding of congressional intent. As we explained in the *Second Report and Order*, Congress intended that "similar services would be subject to consistent regulatory classification."[22] There is the risk that disparities in the current regulatory structure could interfere with the continued growth and development of CMRS and deny consumers the protections they need in the marketplace.[23] To achieve the scheme of regulatory symmetry sought by Congress, we must consider the continued growth and development of CMRS and how it may expand the range of competitive interaction between both current and developing services.

26. This conclusion is based principally on two factors. First, a broad reading of the term "substantially similar" furthers the statutory purpose of promoting uniformity in the technical and operational rules governing CMRS and, thereby, will minimize the potentially distorting effects on the market of asymmetrical regulation. By contrast, a narrow interpretation would allow for the continuation of various regulatory distinctions, a result that is at odds with the statute's goal of eliminating technical regulatory incongruities among different services that compete or will compete with one another. Because a broad reading of the term comports more closely with our understanding of congressional intent,[24] we adopt that reading.

27. Second, as discussed below, our analysis of actual and potential competition supports our conclusion that all commercial mobile radio services are substantially similar for purposes of devising technical and operational rules. As numerous commenters point out, actual competition among certain CMRS services exists already and, more importantly, the potential for competition among all CMRS services appears likely to increase over time due to expanding consumer demand and technological innovation. Such conditions argue for defining the class of "substantially similar" services expansively, for the purpose of establishing baseline technical and operational rules. This characterization of substantial

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[21] *See* paras. 37-43, *infra*.

[22] *CMRS Second Report and Order*, 9 FCC Rcd at 1418 (para. 13).

[23] *See* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 259-60 (House Report).

[24] *See* H.R. Rep. No. 103-213, 103rd Cong., 1st Sess. 494 (1993)(Conference Report)(intent of Congress is that, "consistent with the public interest, similar services are accorded similar regulatory treatment.").

similarity, we conclude, is the surest and most reasonable means of achieving our objectives in this rule making and also is supported by our application of criteria adapted from antitrust principles and case law.

28. Finally, we reject arguments that substantial similarity should be judged by technical differences among services. To the extent that such technical distinctions result from previously disparate regulatory requirements, it is the purpose of the statute and the intent of the Commission to eliminate, to the extent practical, such disparities in regulation.

2. *Background and Pleadings*

29. Last year, Congress created the CMRS classification in order to establish a consistent regulatory framework for all commercial mobile radio services. The creation of a symmetrical regulatory framework for the regulation of similar commercial mobile radio services is an essential step toward achieving the overarching congressional goal of promoting opportunities for economic forces -- not regulation -- to shape the development of the CMRS market.[25] Accomplishing this goal will encourage efficient investment in new services and technologies to meet the demands of consumers for mobile telecommunications services. As one step toward achieving that goal, Congress directed us to revise our rules to ensure that CMRS licensees in reclassified services "are subjected to technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common carrier services."[26]

30. Therefore, if we find that reclassified services are substantially similar to common carrier services for purposes of implementing Section 332 of the Act, as amended by the Budget Act, we must revise the technical and operational rules, to the extent necessary and practical, to assure that licensees in reclassified services have technical and operational[27] rules that are comparable to those rules for substantially similar common carrier services. The *CMRS Second Report and Order* found that licensees in the following Part 90 services could provide CMRS, if their service offering meets the three-pronged definition of CMRS: 800 MHz and 900 MHz Specialized Mobile Radio (SMR) Service (Part 90, Subpart S), Business Radio Service (Part 90, Subpart D), 220-222 MHz commercial two-way nationwide

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[25] *E.g., CMRS Second Report and Order*, 9 FCC Rcd at 1418 (para. 13).

[26] Budget Act, § 6002(d)(3)(B).

[27] The *Further Notice* explained that although the statute refers to "technical" regulations, we believe Congress's use of the term can be construed to include operational as well as technical regulations affecting the delivery of service by CMRS licensees. *Further Notice*, 9 FCC Rcd at 2868 (para. 20, n.36).

and local service (Part 90, Subpart T), and Private Carrier Paging in the 150 MHz, 450 MHz, and 900 MHz bands (Part 90, Subparts D and P).[28]

31. The *Further Notice* requested comment on how determinations of ''substantial similarity'' should be made, both generally and specifically with respect to each reclassified Part 90 service.[29] We tentatively found that the analysis of whether services are substantially similar should focus primarily on the services provided to end users and the extent to which such services meet substantially similar customer needs and demands.[30] The *Further Notice* requested comment on specific factors we should use under this approach to determine whether specific CMRS offerings are competitive with other CMRS services. We suggested several possible criteria for determining ''substantial similarity,'' including: observing the way various CMRS services are marketed to customers; examining whether customers are actually choosing between two services when deciding which mobile service to use; or examining a combination of marketing strategies and customer considerations.[31]

32. In addition, the *Further Notice* attempted to analyze and reach tentative conclusions regarding whether each specific reclassified service could be considered substantially similar to a specific common carrier service.[32] For example, we tentatively viewed wide-area SMR service as substantially similar to cellular service, but suggested that local SMR systems may be less analogous to cellular than to traditional common carrier radiotelephone service provided by Improved Mobile Telephone Service (IMTS) licensees.[33]

33. Most commenters do not attempt to identify factors the Commission should use to determine substantial similarity. Many parties agree with the Commission's general proposal to base substantial similarity on whether services meet similar customer demands.[34] Some commenters, however, argue that the Commission should take into account other factors for

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[28] *CMRS Second Report and Order,* 9 FCC Rcd at 1449-53 (paras. 84-97).

[29] *Further Notice,* 9 FCC Rcd at 2866 (para. 12).

[30] *Id.* at 2866-67 (para.13).

[31] *Id.* at 2867 (para. 14).

[32] *Id.* at 2867-68 (paras. 15-19).

[33] *Id.* at 2867 (paras. 15-16).

[34] McCaw Comments at 21; New Par Comments at 2; NYNEX Comments at 3; PageNet Comments at 12; PCIA Comments at 4-5; Vanguard Comments at 3-4; *see also* Geotek Reply Comments at 2-3 (not disputing Commission's test, but claiming the *Further Notice* misapplied the test with respect to wide-area SMRs).

determining substantial similarity.[35] For example, Brown suggests that, among the elements which the Commission is required to assess in determining whether services are substantially similar, is whether they both enjoy exclusive use of a channel.[36] US Sugar argues that substantial similarity should be determined by technical characteristics such as a system's geographical range, system architecture, user and service characteristics, and future service plans.[37] Similarly, E.F. Johnson asserts that the Commission should look at the objective capability of carriers to compete, as measured by the amount and position of spectrum and the extent of application of frequency reuse, not the subjective perceptions of consumers.[38]

34. Commenters generally examine substantial similarity with regard to each individual reclassified Part 90 service. Many parties agree that wide-area SMRs are substantially similar to cellular.[39] Some reply commenters, however, claim that wide-area SMR providers, such as Nextel, compete with traditional SMR providers rather than cellular providers.[40] Additionally, some parties disagree about whether 900 MHz SMRs can be wide-area service providers.[41] Most commenters contend that "local" SMRs are not substantially

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[35] AMTA Comments at 6; AMTA Reply Comments at 4; Brown Comments at 6-7; E.F. Johnson Comments at iii; E.F. Johnson Reply Comments at 13; ITA/CICS Comments at 5; UTC Comments at 2.

[36] Brown Comments at 6-7; *see also* Celpage Comments at 7-8; Metrocall Comments at 7-8; Network Comments at 7-8; RAM Tech Comments at 7; UTC Comments at 2.

[37] US Sugar Comments at 8; *see also* ITA/CICS Comments at 5.

[38] E.F. Johnson Reply Comments at 13.

[39] Dial Page Comments at 1-2 (anticipating its wide-area SMR system will compete with cellular); E.F. Johnson Comments 4 (referring only to 800 MHz SMRs); McCaw Comments at 22; NYNEX Comments at 3; PCIA Comments at 5; Pittencrieff Comments at 2-3; RF Tech Comments at 2; RMR Comments at 2-3; Southwestern Bell Comments at 3; Southwestern Bell Reply Comments at 10; Sprint Comments at 4; Sprint Reply Comments at 1-2; Vanguard Comments at 5-6; *but see* AMTA Comments at 8 (claiming wide-area SMR service *will be* substantially similar to cellular service); AMTA Reply Comments at 6-7 (arguing wide-area SMRs cannot achieve comparability under the existing regulatory scheme); NABER Comments at 6-7 (contending wide-area SMRs are not similar enough to cellular systems to warrant substantial change in the way SMR systems are regulated); PCC Comments at 2-3 (arguing that these services are not substantially similar because of service area and interoperability rules).

[40] Airwave Reply Comments at 5; ATG Reply Comments at 8-9; Joriga Reply Comments at 7; Kay Reply Comments at 7; NABER Reply Comments at 4; Spruill Reply Comments at 6-7; *see also* Southern Reply Comments at 17-18.

[41] *Compare* E.F. Johnson Comments at 5 n.7 *with* Geotek Comments at 3-5; *see also* AMTA Comments at 9-10 (contending that certain SMR systems do not fit neatly within either the wide-area SMR category or the traditional SMR category).

similar to cellular or any other Part 22 service, apparently basing their conclusions on technological rather than market factors.[42] Similarly, for technical reasons, the vast majority of commenters contend that 220-222 MHz service is not substantially similar to any Part 22 service.[43] Commenters who address the issue argue that Business Radio Service is not substantially similar to any services provided by common carrier licensees.[44]

35. With regard to paging, many parties agree that Part 90 and Part 22 paging services are substantially similar.[45] NABER and PageNet claim that Part 90 and Part 22 paging at 900 MHz are substantially similar to each other.[46] NABER, however, argues that the Commission should maintain special rules for private carrier paging (PCP) licensees below 929 MHz because they operate on shared channels.[47] Several commenters also address the issue of how to treat CMRS providers that offer paging service in conjunction with other commercial services. RF Tech recommends that the Commission consider the ability of wide-area SMRs to provide paging services over their infrastructure and the concerns this may raise regarding the bundling of services and the competitive advantage these wide-area SMR providers will have because paging licensees will not be able to offer mobile telephone

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[42] American Radio Reply Comments at 4-5; AMTA Comments at 8-10; E.F. Johnson Comments at 5-6; NABER Comments at 7-8; PCC Comments at 3-4; RF Tech Comments at 2; Southeastern Reply Comments at 5-7; *but see* RMD Reply Comments at 3 (arguing cellular and SMR systems compete in certain markets for certain customers, but 900 MHz SMR systems will never be able to compete effectively); Southwestern Bell Reply Comments at 8-9; Vanguard Comments at 6-7 (arguing that local SMRs are substantially similar to cellular).

[43] AMTA Comments at 20-21; AMTA Reply Comments at 25; E.F. Johnson Comments at 6; Global Comments at 2; NABER Comments at 8; RF Tech Comments at 3; RF Tech Reply Comments at 3; SEA Comments at 4; SEA Reply Comments at 3; Simrom Comments at 4-7 (also argues that interconnected 220 MHz service should be considered substantially similar to narrowband PCS); *but see* APC Comments at 2 n.4 (arguing it is too early to tell whether 220 MHz licensees will provide services that will be competitive with PCS, cellular, and SMR); SmartLink Comments at 3 (suggesting that Commission defer determination because it is not a mature market); SunCom Comments at 1 (220 MHz narrowband systems are substantially similar to other mobile service systems and must be afforded an opportunity to compete with them on a level playing field); SunCom Reply Comments at 5-6.

[44] E.F. Johnson Comments at 7 (claiming interconnected Business Radio Service is more similar to local SMR service than to cellular service); NABER Comments at 9; RF Tech Comments at 3.

[45] APACG Comments at 3-4; McCaw Comments at 23-24; PCIA Comments at 5; Vanguard Comments at 7-8.

[46] NABER Comments at 9; PageNet Comments at 12.

[47] NABER Comments at 9-10.

services with their pagers.[48] Dial Page, however, contends that although many CMRS services such as cellular, SMR, and PCS are expected to offer paging and short messaging as ancillary services and therefore will provide competition to paging, paging is not competitive with mobile phone and other services offered by these carriers.[49]

36. Some commenters take a broader approach to determining whether services are substantially similar. New Par, for example, claims that CMRS is divisible into two distinct product markets: (1) two-way services (voice and data); and (2) one-way (including acknowledgement paging and other messaging services).[50] With respect to two-way voice and data services, New Par believes that those CMRS services which should be classified as substantially similar include cellular, mobile satellite service (MSS), interconnected SMR (both wide-area and non-wide-area), interconnected Business Radio Service, and 220-222 MHz services.[51] New Par urges the Commission to classify services as substantially similar based on the marketing techniques of CMRS providers or the conduct of customers, rather than current channel capacity, technical quality, or geographic range.[52] US West argues that all "broadband" CMRS is interchangeable from the perspective of the customer, and thus should be treated as substantially similar.[53] US West contends that such treatment will promote regulatory symmetry, be more reflective of market realities, accommodate market changes and technological innovation, and minimize regulatory burdens.[54] US West maintains that "narrowband" CMRS (which US West describes as narrowband PCS and paging) should not be treated as substantially similar to broadband CMRS because there are material

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[48] RF Tech Comments at 4.

[49] Dial Page Comments at 6.

[50] New Par Comments at 3.

[51] *Id.* at 4.

[52] *Id.* at 3-4. New Par also claims that the fact that CMRS providers do not compete on every level of the market, but rather choose to target a specific market niche or sub-market, does not mean that they do not compete for the same customer base. *Id.* at 4.

[53] US West Comments at 4. Without defining the term "broadband," US West reaches its conclusion by reasoning that all users of broadband CMRS have a basic characteristic in common: a need for telecommunications that cannot be met (or met effectively) with wireline services. *Id.* US West concedes that there is a wide diversity of mobile services and that mobile licensees historically have marketed their services to different groups of consumers. *Id.* US West contends, however, that "persons interested in initiating telecommunications while on the move can use any broadband CMRS offering, a fact which makes such services 'reasonably interchangeable.'" *Id.* at 4 & n.9.

[54] *Id.* at 3-4.

distinctions between these types of services, from a customer's perspective.[55] Southwestern Bell urges the Commission to go further and find that all services that meet the definition of CMRS, or their functional equivalent, are substantially similar to each other.[56] According to Southwestern Bell, commenters who requested that their service be treated differently were making "self-serving" claims.[57]

3. *Discussion*

a. Examination of Competition

(1) *General Approach*

37. In light of our stated policy goals, we have concluded that we should adopt an expansive view of the extent of actual or potential competition in the commercial mobile radio services marketplace for purposes of examining the technical and operational rules governing these services. In other words, we will determine the reclassified services that are "substantially similar" to common carrier services based upon a broad assessment of whether licensees in these services are actual or potential competitors with one another. This broad approach will take into account the rapid changes in technology and the resultant dynamic nature of the mobile services marketplace.[58] We believe that changing technology and increasing consumer demand will allow CMRS licensees to use spectrum allocated for a variety of commercial mobile radio services to provide competing services that meet specific consumer needs.

38. In addition to seeking comment regarding the extent of competition across a range of reclassified private services and existing common carriage offerings,[59] the *Further Notice* asked interested parties to address specific reclassified private services, with a view toward determining whether each service is substantially similar to any existing common carrier

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[55] *Id.* at 3 n.7.

[56] Southwestern Bell Comments at 2-3; Southwestern Bell Reply Comments at 6.

[57] Southwestern Bell Reply Comments at 7.

[58] *See* US West Comments at 4-5 (contending that the Commission must take into account the dynamic nature of the telecommunications marketplace in devising rules regarding the "substantial similarity" of CMRS offerings).

[59] *See Further Notice*, 9 FCC Rcd at 2867 (para. 14)("We invite commenters . . . to provide specific comparisons between formerly private services that have been reclassified as CMRS and *all* existing common carrier mobile services.")(emphasis added).

mobile service.[60] In responding to the *Further Notice,* most commenters have taken a relatively narrow view of CMRS competition. In general, commenters have attempted to describe the current state of competition between specific reclassified services and existing common carrier mobile services. In addition, several commenters discuss constraints on competition based on the technological design and current service rules for reclassified services.[61] Thus, many commenters do not take an overall view of the CMRS marketplace, or consider the potential for competition in the CMRS marketplace.

39. We believe, however, that the best way to ensure that we create an enduring regulatory system that applies comparable technical and operational rules to similar CMRS licensees, is to anticipate the potential for increasing competition by providing sufficient flexibility to licensees in our rules. This flexibility will enable them to adapt their services to meet customer demands. If the Commission were to ignore the accelerating pace of technology or the ability of CMRS providers to respond to growing and changing consumer demand for mobile radio services, our technical and operational rules might inhibit rather than promote competition and growth in the mobile services marketplace. Therefore, we will not limit our examination to the manner in which services are provided today. Rather, we will also consider the potential for new service offerings to use existing CMRS spectrum to meet future consumer demands.

40. In deciding that current and potential competition are the best measures for determining whether services in the CMRS marketplace are substantially similar, we also have concluded that the narrower measurements propounded by some of the commenters would not be as effective or appropriate in serving the objectives of this proceeding. First, we believe it would be somewhat circular to conclude that Part 90 technical and operational rules applicable to reclassified private carriers should not be conformed to rules governing existing CMRS providers, on the basis that such reclassified carriers are not ''substantially similar'' to common carriers *because* they are subject to different technical and operational rules. In instructing us to address the need to conform these technical and operational rules, Congress presumably took account of the fact that the rules are different. Application of the narrow test advocated by some commenters would seem to end the congressionally mandated analysis before it begins. We find no basis for such congressional intent.

41. Second, this narrow test would have the effect of freezing in place disparate provisions in our rules applicable to existing CMRS carriers and reclassified private carriers. This would seem to undermine our objective -- and the congressional mandate -- to create a symmetrical regulatory structure for all carriers competing in the CMRS marketplace.

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[60] *See Further Notice*, 9 FCC Rcd at 2867 (paras. 15-16)(SMR service), at 2867 (para. 17)(220-222 MHz service), at 2868 (para. 18)(business radio service), at 2868 (para. 19)(paging service).

[61] *E.g.*, Brown Comments at 6-7; Celpage Comments at 7-8; E.F. Johnson Reply Comments at 13; ITA/CICS Comments at 5; Metrocall Comments at 7-8; Network Comments at 7-8; RAM Tech Comments at 7; US Sugar Comments at 8; UTC Comments at 2.

Finally, a narrow test, under which the definition of "substantially similar" turns on the differences in technical and operational rules, would inhibit our overall objective of creating a regulatory framework in which flexibility is maximized, so that carriers have a real opportunity to use their allocated spectrum in ways that adapt quickly to changing consumer demand. We seek a regulatory environment in which carriers can take advantage of technological innovation to modify their service offerings to compete against other carriers in trying to serve emerging consumer needs and demand for new and varying types of wireless services.

42. We emphasized above that our overall objective of creating a regulatory regime for commercial mobile telecommunications services that will permit providers to compete efficiently has guided our determination of "substantially similar" services. It is important to recognize that a different set of policy goals, or the application of the same policy goals to differing circumstances, may require a different framework for analysis and result in different conclusions regarding the extent of competition. For example, in the context of our forbearance analysis,[62] the *CMRS Second Report and Order* focussed on the level of competition within individual categories of commercial mobile radio services, but we stated that "our doing so is not intended to prejudge the issue of whether, and to what extent, there is competition among these various services."[63] Rather than evaluating the potential for competition among various classes of CMRS services, as we do here, our forbearance analysis considered only actual competition in particular services. That approach was appropriate in order to ensure that the competitiveness of the marketplace was sufficient to permit the removal of regulatory restraints. Similarly, in the *CMRS Equal Access and Interconnection Notice*,[64] we tentatively concluded that the presence or absence of market

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[62] Pursuant to Section 332(c)(1)(A) of the Act, the Commission may forbear from enforcing any provision of Title II, except Sections 201, 202, and 208 with respect to a particular commercial service, if the Commission determines that: (1) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such provision is not necessary for the protection of the public interest; and (3) specifying such provision is consistent with the public interest. 47 U.S.C. § 332(c)(1)(A). As part of evaluating the "public interest" described in Section 332(c)(1)(A)(iii), Section 332(c)(1)(C) mandates that the Commission consider "whether the proposed regulation . . . will promote competitive market conditions, including the extent to which such regulation . . . will enhance competition among providers of commercial mobile service. . . ." 47 U.S.C. § 332(c)(1)(C). Since the third prong of the forbearance test requires the Commission to consider the effect of competition in the CMRS marketplace, we examined the nature of competition in the CMRS marketplace to assist us in our forbearance analysis. *See CMRS Second Report and Order*, 9 FCC Rcd at 1463-64 (paras. 125-126).

[63] *Id.*

[64] Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, RM-8012, Notice of Proposed Rule Making and Notice of Inquiry, FCC 94-145, released July 1, 1994 (*CMRS Equal Access and Interconnection Notice*).

power is an important factor in determining whether imposing equal access and other interconnection obligations on CMRS providers is in the public interest.[65] We applied a different analysis to different classes of CMRS providers, given the differing degrees of competition.[66] The goal of regulatory symmetry that we pursue in this Order might not apply, or might be offset by other regulatory goals and objectives, in other contexts such as the equal access and interconnection proceeding.[67]

43. In this Order, however, we determine that our policy goals and our understanding of the dynamic nature of the CMRS marketplace lead us to the conclusion that all commercial mobile radio services compete with one another, or have the potential to compete with one another, to meet the needs of consumers to communicate while on the move. In the future, our assessment of the competitive relationships among different service providers in the mobile services marketplace might vary from the approach we are taking here if, for example, the question before us is whether to extend additional forbearance measures only to certain classes of service providers.[68] The guiding principle in both instances is our goal of promoting competition and thus serving the interests of consumers.

(2) *Antitrust Principles*

44. We believe that it is useful, in assessing the similarity of various CMRS offerings, to examine related areas of law in which rules and principles have been developed for the purpose of promoting competition in the national economy. Several commenters have suggested that we examine certain aspects of antitrust law for this purpose.[69]

45. We have assessed two aspects of antitrust principles as part of our analysis of the CMRS marketplace. First, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have developed guidelines for determining whether a horizontal merger will

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[65] *Id.* at paras. 32-34, 124-126.

[66] *Id.* at paras. 35-49, 127.

[67] *Id.* at para. 127 ("Since the establishment of different interconnection obligations for different classes of CMRS providers would, by definition, result in a lack of symmetry in the regulation of CMRS providers, commenters should address the issue of whether the benefits that may be realized from differing interconnection obligations outweigh the costs that might result from this lack of regulatory symmetry.").

[68] This issue of additional forbearance is under exploration in a related rule making proceeding. *See* Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, GN Docket No. 94-33, Notice of Proposed Rule Making, 9 FCC Rcd 2164 (1994).

[69] *See, e.g.*, New Par Comments at 2 n.2; Southern Reply Comments at 20-23; US West Comments at 4 & n.9.

violate applicable antitrust laws.[70] The *Merger Guidelines* outline the enforcement policy of DOJ and the FTC concerning horizontal mergers subject to Section 7 of the Clayton Act[71] (prohibiting mergers whose effect ''may be substantially to lessen competition, or to tend to create a monopoly''), Section 1 of the Sherman Act[72] (prohibiting mergers if they constitute a ''contract, combination . . . , or conspiracy in restraint of trade''), or Section 5 of the Federal Trade Commission Act[73] (prohibiting mergers that constitute an ''unfair method of competition''). Second, we have reviewed a number of antitrust decisions, some of which have been cited by commenters in this proceeding, for purposes of examining the extent to which principles developed in those cases may be used to inform our assessment of CMRS competition.

46. In addressing the question of the relevance of antitrust principles to the issues we are examining in this rule making, we first need to review the goals and objectives we are pursuing in this proceeding so that we can compare them with the goals and objectives served by the antitrust rules and principles. The Communications Act requires us to regulate commerce in communications to ''make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . .''[74] This legislative mandate calls upon the Commission to play a dynamic, proactive, and forward-looking role in regulating telecommunications. Thus, our resolution of issues in this proceeding must, in part, seek to develop rules that anticipate the future course of the telecommunications marketplace so that our rules augment the ability of the marketplace to meet consumer needs and demand for facilities and services. In addition, as we have noted, Congress amended Section 332 of the Communications Act last year to establish two principal objectives for the Commission -- to create a new approach to the classification of mobile services to ensure that substantially similar mobile services are subject to consistent regulatory classification, and to ensure that an appropriate level of regulation is established and administered by the Commission for CMRS providers.[75]

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[70] *See* Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (Apr. 2, 1992), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 7, 1992)(hereinafter referred to as ''*1992 Merger Guidelines*'' or ''*Merger Guidelines*''). We believe that, in some respects, horizontal mergers raise questions that are roughly analogous to the issues we consider in this Order because, for example, horizontal mergers involve the concentration of ownership among services that compete with each other.

[71] 15 U.S.C. § 18.

[72] 15 U.S.C. § 1.

[73] 15 U.S.C. § 45.

[74] Communications Act, § 1, 47 U.S.C. § 151.

[75] Communications Act, § 332(c), 47 U.S.C. § 332(c), as amended by Budget Act, § 6002(b)(2)(A)(iii). *See CMRS Second Report and Order*, 9 FCC Rcd at 1418 (paras. 13-14).

47. We recognize that the antitrust principles and case decisions we discuss have a somewhat limited applicability because they are applied in circumstances that differ in important respects from those in which this proceeding has arisen.[76] The general objectives of the antitrust statutes are somewhat different from the purposes and goals of the Communications Act. The antitrust statutes seek to prevent mergers and other anticompetitive arrangements (*e.g.*, horizontal price fixing) in specific cases if the arrangements are likely to lessen competition substantially. The analysis, therefore, centers on the prevention of anticompetitive outcomes in specific cases. As we noted in the preceding paragraph, our goals and objectives under the Communications Act are somewhat different. Nonetheless, in deciding whether reclassified private mobile radio services are substantially similar to common carrier mobile service offerings, we need to evaluate and reach conclusions regarding the extent to which commercial mobile radio services compete or may compete against each other. It is for this reason that we turn our attention to the *1992 Merger Guidelines* and to the antitrust approach of *Brown Shoe*[77] favored by some commenters: We believe that the competitive criteria that have been developed in the antitrust literature and case law are useful as a means of supporting conclusions we reach in this Order regarding the extent of actual and potential competition in the CMRS marketplace.

(3) *Framework for Evaluation*

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[76] *See* Satellite Business Systems, Applications for Authority Pursuant to Sections 308, 309 and 319 of the Communications Act of 1934 To Construct Three Domestic Communications Satellites, Memorandum, Opinion, Order, Authorization and Certification, 62 FCC 2d 997, 1074 (1977), *aff'd*, United States v. FCC, 652 F.2d 72 (D.C. Cir. 1980)(*Satellite Business Systems*)(emphasis in original):

> While we are of the view that . . . cases arising in the competitive, non-regulated sphere of the economy cannot be controlling of our disposition of [the pending applications] under our public interest standard and regulatory mandate, the standards for objective analysis of relevant markets contained therein are *useful* in our determination of the public interest and we shall apply them accordingly. It must be recognized, however, that our determination of a "market" for purposes of analyzing any potential anticompetitive effects -- one factor in the public interest -- cannot be rigidly controlled by antitrust laws.

See also Mobilecom of Alabama, 3 FCC Rcd 7115, 7116-17 (Com.Car.Bur. 1988). *See generally* FCC, Transcripts of PCS Public Forum, Apr. 11-12, 1994, at 224 (statement of D. Kelley)("[P]romoting a competitive structure is not the same thing as using a merger guidelines analysis to prevent undue concentration. Your job [*i.e.*, the Commission's job] is to promote competition[,] not to prevent bad things from happening. And in the course of doing that you should provide opportunity for new entrants because that is going to bring the most competition to the market.").

[77] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

48. We have concluded that antitrust principles and case decisions can serve our purposes here by establishing the following framework for our analysis. We believe that the "reasonable interchangeability" test is a probative means of gauging competition among CMRS offerings. This test, first articulated in the *du Pont* case,[78] was elaborated by the Supreme Court in *Brown Shoe*, in which the Court described a standard based upon "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[79]

49. We conclude that certain of the specific criteria developed by the Court in applying the interchangeability test are useful indications for our assessment of CMRS competition. In *du Pont*, the Court held that customer uses and needs met by the products or services under review, as well as the respective prices of the products or services, must be studied in order to determine whether the products or services are reasonably interchangeable.[80] For example, in *United States v. Grinnell Corp.*,[81] the Court found that the relevant service at issue was the protection of property through a central service station even though individual alarm services such as burglar alarm and fire alarm service are not interchangeable with each other. According to the Court, central station companies recognized that to compete effectively, they must offer all or nearly all types of service.[82] The Court also found that although there are substitutes for protection services provided through a central service station, none of them was reasonably interchangeable because many customers would not consider these services as adequate substitutes for a central service station.[83] Thus, customer uses and needs -- and the manner in which these uses or needs are met by a particular service or package of services -- must be a critical aspect of our evaluation of competition between CMRS services.

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[78] United States v. E.I. du Pont de Nemours, 351 U.S. 377 (1956)(*du Pont*).

[79] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962). *See generally* D. Baker, INTERNATIONAL MERGERS: THE ANTITRUST PROCESS 453-57 (1991). Courts have recognized the difficulties involved in measuring cross elasticities of demand, and have considered surrogates for cross elasticity data. *See, e.g.*, U.S. Anchor Mfg. v. Rule Industries, 7 F.3d 986, 995 (11th Cir. 1993).

[80] *du Pont*, 351 U.S. at 404.

[81] 384 U.S. 563 (1966).

[82] *Id.* at 572.

[83] *Id.* at 573-75.

50. We also note that antitrust case law recognizes the desirability of assessing the potential for competition as an important measurement of relevant markets.[84] As we will discuss at greater length in a subsequent section,[85] we conclude that our analysis must include an evaluation of the potential for competition among various services in the CMRS marketplace. A defining characteristic of this marketplace is the fact that technology gives carriers the means to adapt their use of spectrum, and recast the features and functions of their products, in order to respond to customer needs and demand. This ability to adapt spectrum use is augmented by regulatory policies that refrain from restricting services that carriers may provide over spectrum licensed to them.[86]

b. Comparison of Services

(1) *Evaluation of CMRS Marketplace*

(a) Overview

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[84] *See, e.g.,* U.S. Anchor Mfg. v. Rule Industries, 7 F.3d 986, 995 (11th Cir. 1993)("Defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability -- actual *or potential* -- to take significant amounts of business away from each other.")(emphasis supplied). *See also* United States v. Continental Can Co., 378 U.S. 441, 458 (1964)("The merger must be viewed functionally in the context of the particular market involved, its structure, history *and probable future*.")(emphasis supplied); United States v. FCC, 652 F.2d 72, 93 (D.C. Cir. 1980)(affirming *Satellite Business Systems*)(emphasis supplied):

> [T]he domestic satellite communications industry is in its highly risky and experimental phase. The field is rapidly changing technologically and economically. As a result the Commission's determinations must necessarily "depend to a greater extent upon policy judgments and less upon purely factual analysis." *Industrial Union Department, AFL-CIO, v. Hodgson*, 499 F.2d 467, 474 (D.C. Cir. 1974). As the Supreme Court has said, "where agency decisions are of a judgmental or predictive nature," F.C.C. v. National Citizens Committee for Broadcasting, 436 U.S. 775, 813, 98 S.Ct. 2096, 2121, 56 L.Ed.2d 697 (1978), "complete factual support in the record for the Commission's judgment or prediction *is not possible or required*; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency. . . .'" *Id.* at 814, 98 S.Ct. at 2122.

[85] *See* paras. 69-77, *infra*.

[86] *But see, e.g.,* Section 22.515 of the Commission's Rules, 47 CFR § 22.515 (establishing certain restrictions applicable to Part 22 licensees' base station communications).

51. Our task, as we have described, is to determine the range of competitors in the CMRS marketplace, because we have concluded that the presence of or potential for competition among CMRS services is the driving factor in determining whether reclassified private services are substantially similar to existing commercial services for purposes of establishing baseline technical and operational rules under Section 332 of the Act.

52. In proceeding with this task, we will first present a brief snapshot of market trends in the CMRS marketplace as a means of setting the stage for our evaluation. We will then turn to our application of competitive criteria -- reasonable interchangeability, customer uses and needs met by services, and the potential for competition -- to the CMRS marketplace. Finally, we will discuss the relevance of our conclusions in this section for our analysis of specific technical and operational rules that will follow in succeeding sections.

(b) Marketplace Features and Trends

53. Before turning to our examination of specific competitive criteria, we present here a brief review of the principal CMRS marketplace features and trends. Growth and competition are the defining features of the wireless marketplace.[87] Technology, regulatory policies, and explosive growth in consumer demand continue to propel the expansion of services in the wireless industry.[88] This growth is in part a product of emerging competition in the industry. It will lead to even more competition as various commercial service providers pursue strategies to capture new customers.

54. A review of selected wireless services illustrates the breadth of industry expansion. Recent growth in the cellular industry has continued to be strong,[89] and this growth is

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[87] *E.g.*, Standard and Poor's Industry Surveys, "Telecommunications Basic Analysis," June 2, 1994, at T38 (hereinafter cited as "S&P Survey")("Competition is coming to the wireless world and it is expected to be fierce.").

[88] *Id.* (wireless penetration expected to expand to 20 percent by the end of this century). "Wireless demand, as evidenced by the most basic provision of cordless, cellular and paging products, remains unquestioned, rather the question is whether or not there is enough managerial and engineering resources to speed delivery . . . ." F. Moran & E. Weinstein, THE WIRELESS TELECOMMUNICATIONS REVIEW 24 (Spring 1994)(Salomon Brothers publication)(hereinafter cited as "Moran & Weinstein").

[89] "The [cellular] industry's explosive growth in 1993 has spilled over into 1994, reflecting continued consumer interest, coupled with improved accessibility, as services have become increasingly more demand-driven and affordable. In 1993, the cellular industry boosted its penetration to 6% of the population by adding roughly five million net new subscribers rendering 16 million users nationwide, up from 11 million in 1992 for more than 45% subscriber growth. We project 5.5 million net new subscriber additions in 1994 to result in about 35% subscriber growth for 1994 to 21.5 million users or better than 8% penetration of the population. We believe that existing operators will (continued...)

expected to shift into new markets.[90] Cellular service is expected to reach 20 percent penetration, or approximately 54 million customers, by the year 2000.[91] The SMR industry also is experiencing significant growth.[92] Approximately 240,000 SMR units were in operation in 1984. That figure has now grown to approximately 1.5 million operating units.[93] SMR growth, which some have projected to reach 4.2 million customers by the year 2000[94] and others have projected to reach 9 million by 2003,[95] has been accompanied by a substantial amount of spectrum consolidation.[96] The paging industry is expected to have 22 million customers by the end of this year, and 41.5 million customers by the year 2000.[97] Paging

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[89](...continued)
reach 20% penetration or about 54 million users by the year 2000, despite an increasingly competitive environment." *Id.* at 4.

[90] "The greatest share of future [cellular] revenue growth . . . will be driven primarily through exploiting new market segments and distribution channels created from the pending explosion in data and consumer-oriented services." *Id.* at 6.

[91] *Id.* at 4.

[92] From 1987 to 1992, SMR units increased by 14 percent, from 628,000 to 1.34 million. L. Runyon & S. Birch, SMR IN THE UNITED STATES: A WINDOW OF OPPORTUNITY 35 (Oct. 1993) (Merrill Lynch publication).

[93] Moran & Weinstein at 9.

[94] Cellular Telecommunications Industry Association, *The Changing Wireless Marketplace*, at 8 (Dec. 17, 1992).

[95] S&P Survey at T39 (citing PCIA estimate).

[96] Moran & Weinstein at 10:

> Over recent years, and especially in recent months [in early 1994], the [SMR] industry has undergone a rapid phase of spectrum consolidation. Early consolidators, led by Nextel, envisioned that the aggregation of SMR spectrum, coupled with advances in digital technology in a network architecture utilizing a frequency reuse pattern in a cellular-like configuration, could increase system capacity and quality, thus permitting a viable alternative to cellular service. Recent spectrum aggregation, demonstration of MIRS [Motorola Integrated Radio System] technology, various other technological alliances, and potential proliferation under the MCI franchise have reduced risks and contributed heavily to increased realization of the industry's aggressive plans.

[97] *Id.* at 20:

(continued...)

growth has been driven primarily by increased competition, improved services, and declining costs.[98] Paging operators also are shifting emphasis toward nationwide and consumer markets.[99]

55. Forecasters expect that rapid growth throughout the wireless marketplace will continue in the future.[100] Technology and increasing customer demand for greater mobility and portability are identified as the principal sources of this projected growth.[101] Expansion

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[97](...continued)

> We estimate that the paging industry grew by 25% in 1993 to 18.7 million customers nationwide. The expansion marked the second year of an improved growth rate for the industry, reflecting the exploitation of the consumer marketplace. For 1994, the industry should add about 3.6 million users, bringing its total to more than 22 million or 8.5% penetration of the population. By the year 2000, penetration could approach 15% or 41.5 million users.

See also "As Paging Prices Keep Declining, Subscriber Numbers Increase," *Land Mobile Radio News*, July 1, 1994, at 8.

[98] Moran & Weinstein at 21.

[99] *Id.*

[100] Personal Communications Industry Association, *1994 PCS Market Demand Forecast* at third page (unpaginated) (Jan. 1994):

> All eight PCS Services studied [*i.e.*, new PCS, cellular, paging, ESMR/SMR, dedicated data service, satellite, wireless private branch exchange (PBX), and cordless] will continue to grow, despite increased competition. . . . Available market research indicates that there is a very high amount of unmet demand for personal communications. Decreasing prices, advanced technologies, and creation of licenses will enable service providers to fill the demand gap. . . . The complementary nature of PCS services will create a market in which users of one wireless service may adopt additional services to enhance overall functionality. For example, cellular users may adopt an alphanumeric pager for message screening and response queuing . . . . A wide array of services is developing, each with its own specific functionalities, service mix and market advantages. These services each have varying price points and levels of technical complexity.

[101] "Advances in technology, coupled with increasing demand for mobility and portability, will assist in the proliferation of product to the mass market. Ultimately, offerings will be sold to the mass market not on technology, but on brand name, convenience and reliability of service, and ultimately, price." Moran & Weinstein at 7.

into consumer markets and mobile data services also is expected to continue.[102] Two features of this projected growth are relevant to the competitive analysis we are undertaking in this Order. First, competition and technology are major factors in this growth.[103] Technological advances have brought an expanding array of affordable services to the marketplace. The features and functions of these services have made them increasingly important in the business environment and have also led to their growing popularity in other consumer markets. As we approach the issue of market definition, we need to keep in focus the fact that we are striving to establish a regulatory framework that promotes competition and technological innovation in the wireless marketplace. Such a framework brings important benefits to consumers, such as innovative new services at reasonable rates.

56. Second, growth in the wireless marketplace is bringing with it an increasing degree of service convergence.[104] Technology and consumer demand, facilitated by our general policy not to restrict the services that can be provided over any particular band, are prompting commercial service providers to follow marketing strategies that blur the differences between the various services comprising the wireless marketplace. This fact must inform our assessment of competitive issues -- our policies will best be served by a definition of substantial similarity that recognizes this reality of the wireless marketplace, and that facilitates the continued progress of this service convergence.

(c) Customer Uses or Needs Met by Services

(i) *Common Characteristics of Customer Needs*

57. In approaching the issue of "reasonable interchangeability," we must first determine the types of customer uses and needs that are served in the mobile marketplace. It could be argued that the mobile marketplace is nothing more than a constellation of diverse service offerings that seldom intersect in meeting highly differentiated customer needs. Thus, it could be argued, for example, that customers desiring conventional interconnected SMR

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[102] *E.g.*, D. Connaughton, "U.S. Wireless Revolution Flourishes," *Telocator*, Apr. 1993, at 12. *See* Moran & Weinstein at 1 ("The consumer marketplace will be exploited over the next several years as wireless and telecommunications companies combine their sales expertise with enhanced service offerings and more affordable access to drive subscriber penetration."); S&P Survey at T40.

[103] *E.g.*, Moran & Weinstein at 3 ("We believe that the net effect of competition will work to create a larger market for wireless telecommunications services rather than a significant erosion of existing share away from current operators.").

[104] *See, e.g.*, Nextel Comments at 24 ("[C]onsumers are interested in services and functions; they are indifferent to regulatory categories. Even in the context of traditional SMR operations, consumers select between the full array of presently existing wireless services and, on a month-to-month basis, constantly migrate from one service to another. . . . This no doubt reflects a seamless continuum of consumer preferences based on individual evaluations of price, service and functionality."). *See also* Moran & Weinstein at 1, 24.

dispatch services would not be likely to subscribe to cellular service as a substitute. Similarly, such an argument would hold that cellular customers could not reasonably be expected to purchase one-way paging as a substitute. We do not subscribe to such a balkanized view of the CMRS marketplace. Such a narrow conception does not comport with the realities of the marketplace, does not advance our objectives under the Communications Act, and, we believe, is not consistent with antitrust principles.

58. The common characteristic of mobile services customers is their need to communicate electronically on a real-time basis (or virtually real-time basis) while they are "on the move." This is a need that cannot be met by conventional wireline telecommunications services, but it *can* be met by each service comprising the CMRS marketplace.[105] Subscribers to paging services, cellular services, SMR offerings, mobile data services, 220 MHz services, and Business Radio Services all share this common need for mobile communications. We recognize that, in today's CMRS marketplace, some of these various services meet this common communications need in *different* ways, by providing services with different features, functions, cost, and quality of service.[106] This fact, however, in no way compromises our conclusion that all of these services compete or have the potential to compete with one another to serve customers' needs.

59. One factor sustaining our conclusion is that technological innovation, currently and in the future, acts as a powerful engine in driving mobile offerings toward a convergence of similar service offerings designed to respond to customer demand for these similar services. This consideration is developed in the following section. A second factor is that, even in today's CMRS marketplace, services meeting the same customer needs in different ways can in fact be viewed as competing against each other.

60. One-way paging service illustrates this latter point. One-way paging and cellular service meet customer needs in substantially different ways: the paging subscriber can receive communications through a single tone, multiple tones, numeric messages, or alphanumeric messages.[107] The cellular customer, on the other hand, has the capability of establishing two-way voice communication. Notwithstanding these functional differences, we conclude there is a basis for finding that these services compete with one another. First, paging and cellular companies perceive themselves as competing for the same customers. For example, the industry trade press has reported that "Paging Network Inc. and Motorola Inc. have teamed up to develop a voice pager that will use digital technology to capture, store and

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[105] *Cf.* US West Comments at 4 (arguing that persons interested in initiating telecommunications while on the move cans use any "broadband" CMRS offering).

[106] We also recognize that these functional differences, as they exist in today's marketplace, have implications for our decisions regarding the need to conform differing technical and operational rules. See the discussion at paras. 78-79, *infra*.

[107] D. Rose, "Data Paging Opens a Major New Market," *Telocator*, Mar. 1993, at 8.

replay the human voice. . . [T]he device is expected to be extremely easy to use, smaller than a cellular telephone and less costly . . . ."[108] Market analysts also believe there is a basis for viewing one-way paging and cellular service providers as participants in a broadly defined wireless services marketplace.[109]

61. Second, cellular carriers are in a position to begin offering one-way paging in conjunction with their cellular offerings. For example, a cellular provider announced last year that it intended to begin offering customers in some of its service areas paging service together with existing cellular service. The carrier indicated that it would offer pagers to customers who want paging service exclusively, but would concentrate its marketing efforts on joint offerings incorporating paging and cellular services.[110] This announcement suggests

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[108] "VoiceNow Promises To Make Voice Paging More Efficient," *Radio Communications Report*, Apr. 25, 1994, at 17. *See also* "PageNet Intros Pager Service That Stores Voice Messages," *Radio Communications Report*, Apr. 19, 1993, at 11 ("Motorola Vice President Fernando Gomez noted, 'The ability to receive voice messages instantaneously and conveniently, without the additional expenses normally associated with cellular or voice mail services, is expected to intensify consumer acceptance of paging services.'"). Moreover, paging operators are recognizing the need for a fundamental change in their own perception of the position they hold in the wireless marketplace. For example, David Garrison, president of SkyTel, has argued that paging industry players need to redefine their role. Paging companies must stop concentrating on technology and how information is delivered, in order to "'move from the model of thinking you are in the paging business to recognizing you are in the information transport business.'" "Beyond the Beep: Paging Applications for the 90s and Beyond," *PCIA Bulletin*, July 1, 1994, at 8 (quoting David Garrison). ***But see*** D. Connaughton, "U.S. Wireless Revolution Flourishes," *Telocator*, Apr. 1993, at 10 ("'Paging is complementary not competitive with cellular,' said [George M.] Perrin [president and chief executive officer of PageNet]. 'When we took our company public a year and a half ago, cellular competition was of great concern to the investment community. However, because of lower infrastructure costs, paging is able to bring service to the market at a much lower per minute cost than cellular. That ends up as a complementary and, quite frankly, a positive synergistic benefit between the two services.'"); Moran & Weinstein at 21 ("Paging provides nearly ubiquitous communications with service currently available to about 95% of the U.S. population. The robust digital transmission signal provides high-quality, in-building penetration that ensures the subscriber that messages most likely will be received. The advantage of paging over cellular service is that the unit is smaller, has longer battery life and is substantially less expensive to use. In addition to short messaging, paging carriers offer enhanced ancillary services, including voice mail, numeric storage, automated answering services, stock quotations, sports scores, weather, and similar offerings.").

[109] *See* D. Connaughton, "U.S. Wireless Revolution Flourishes," *Telocator*, Apr. 1993, at 8 ("The wireless communications market includes paging products and services [and] cellular phones and related services . . . .").

[110] "Bell Atlantic Mobile Offering Paging to Cellular Customers," *Radio Communications Report*, Dec. 6, 1993, at 9. *See also* J. Rapp, "Paging: Balancing Short-Term Profits with Long-Term Potential," *Business Radio*, June 1994, at 16 ("[P]aging operators of all sizes, even the very largest,

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that cellular operators are seeking to combine their service with one-way paging in order to compete against paging providers, hoping that customers will find the combined cellular-paging package more attractive than a "stand-alone" paging offering. Courts have held that such packaged and stand-alone products or services can be viewed as competing with each other.[111]

62. Finally, it appears that both cellular and paging companies are pursuing marketing strategies that emphasize the need to establish nationwide service[112] and to expand their offerings to meet the needs of non-business customers.[113] This commonality in marketing

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[110](...continued)
should be aware of new competition from . . . [c]ellular operators . . . ."); "PacTel, Motorola Sign Contract for CDMA Cellular System in Los Angeles," *Telocator Bulletin*, Jan. 14, 1994, at 11 ("The installation of CDMA digital technology will enable the carrier [PacTel Cellular] to expand its service to include short alphanumeric messages, voice mail notification, one-number calling, data communications and improved in-building coverage.").

[111] *See* Thurman Industries, Inc. v. Pay 'n Pak Stores, Inc., 875 F.2d 1369, 1374-77 (9th Cir. 1989); *but see* Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979). We reached a conclusion similar to the *Thurman* decision in *Satellite Business Systems*:

> [T]he particular package of offerings which form SBS' proposal are intended to be attractive to potential customers; SBS would not be seeking to enter the market if it did not feel that there would be a demand for it. However, while SBS' package of characteristics may, in the aggregate, be different in degree from competitive offerings today, in our judgment, it is not *so* different in degree as to lose its reasonable interchangeability with alternatives, and therefore establish a separate relevant market . . . .

Satellite Business Systems, 62 FCC 2d at 1086 (emphasis in original).

[112] "Paging's emphasis on nationwide networks [has] mirrored that of the cellular and ESMR industries, all of which have decided that 'every consumer in America needs to have nationwide service.' . . . [T]his [is] a major trend in wireless communications." M. Vernetti, "Nationwide Paging Networks: Wireless Links to an Array of Services," *PCIA Journal*, Feb. 1994, at 17 (quoting John L. Bauer III, vice president, Prudential Securities). *See also* D. Connaughton, "The 1990s May Be the Wireless Decade," *Telocator*, June 1993, at 16 ("'There has been a trend in the [paging] industry from local to wide-area paging and even to nationwide paging. We are now in the beginning, I think, of a transition from numeric display to alphanumeric display that will take place in the last half of the '90s and to more national versus regional markets.'")(quoting Andrew D. Rescue, chief executive officer of Economic and Management Consultants International, Inc.).

[113] P. Hopkins, "Add-Ons Make Alpha Paging Sizzle," *Telocator*, Nov. 1992, at 12:

(continued...)

strategies, coupled with the other factors described in the preceding paragraphs, suggests that one-way paging and cellular carriers are or will be competing with one another.

63. In addition, the notion that discrete classes of services, as defined by our licensing rules, are not in competition with other services in the CMRS marketplace appears to be inconsistent with congressional goals in revising Section 332 of the Communications Act. Congress has required that we conform the technical and operational rules that apply to CMRS carriers that provide "substantially similar" services. We have decided that services will be considered substantially similar if they compete against each other or have the potential to compete against each other. Thus, our governing policy objective in this context is to subject all CMRS providers that offer or could offer services in competition with other CMRS providers to the same technical and operational rules, to the extent practicable. As stated above,[114] we may apply different policy objectives, or may utilize a different competitive analysis, in other contexts.

64. Our conclusions regarding competition in the CMRS marketplace control the extent to which we require the conformance of technical and operational rules under which reclassified private carriers and other commercial carriers operate. Taking into account the uniquely dynamic nature and continuing growth of the mobile services marketplace, the powerful impact of technology in shaping carriers' options in bringing services to the marketplace, and the trend toward increasing competition among different classes of services in the marketplace, we believe that we have arrived at a reasonable and durable approach to the definition of substantially similar services. Were we to take a narrower view, disparate technical and operational rules might remain in effect, to the detriment of competition and, thus, to consumers, because differences in these rules could distort competition by providing advantages to some carriers and imposing handicaps on others. We conclude that it is well within our discretion under the Communications Act to give substantial weight to these factors and concerns because they affect our ability to achieve the objectives of regulatory

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[113](...continued)

> [C]ommunications products show explosive growth as their use expands from the business market to private use. This process is exemplified by such communication devices as pagers and cellular phones. Consumer awareness of these services and their benefits outside of the business market has created opportunities for extended market penetration and has been a major contributing factor to the explosive growth in pager sales.

See also A. Rescue, "Pagers for the Masses: The Year of Consumer Paging," *Telocator*, Jan. 1993, at 9 ("Cellular is now entering a phase in which personal use represents the majority of airtime minutes. . . . Paging, the most mature of the mobile communications technologies, began to shift to a subscriber base of personal users in 1992. This trend has important implications for future industry growth and for distribution strategies employed by carriers.").

[114] *See* para. 42, *supra*.

symmetry and the promotion of competition in the wireless marketplace. We also conclude that taking these factors and concerns into account requires the expansive characterization of competition in the CMRS marketplace that we are adopting in this Order.

65. We also conclude that antitrust principles and case law lend support for the determinations we make in this Order regarding the extent of competition among CMRS services. For this conclusion we rely in part upon *Continental Can*,[115] a case involving the acquisition of the third largest glass container manufacturer by the second largest metal container manufacturer (Continental Can Company). The Supreme Court reversed the lower court's conclusion that metal and glass containers each constituted a separate product market. The Court recognized that glass and metal containers have different characteristics which may prevent one or the other from a particular use, and that competition between glass and can companies is different than the competition between can companies themselves or between glass companies. The Court concluded, however, that the reasonable interchangeability of use standard established in *Brown Shoe* was not limited to "competition between identical products, the kind of competition which exists, for example, between the metal containers of one company and those of another or between the several manufacturers of glass containers."[116]

66. The Court pointed to the fact that glass containers had replaced metal containers as the dominant packages for baby food and that metal cans had become competitive with glass containers in the soft drink and beer packaging industries. The Court concluded:[117]

> Metal has replaced glass and glass has replaced metal as the leading container for some important uses; both are used for other purposes; each is trying to expand its share of the market at the expense of the other . . . . Thus, though the interchangeability of use may not be so complete and the cross-elasticity of demand not so immediate as in the case of most intraindustry mergers, there is over the long run the kind of customer response to innovation and other competitive stimuli that brings the competition between these two industries within [the Clayton Act].

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[115] United States v. Continental Can, 378 U.S. 441 (1964)(*Continental Can*). For subsequent decisions relying on *Continental Can*, *see, e.g.*, Fort Worth National Corp. v. Federal Savings & Loan Ins. Corp., 469 F.2d 47, 60 (5th Cir. 1972); United States v. Ivaco, 704 F. Supp. 1409, 1415 (W.D.Mich. 1989); FTC v. Owens-Illinois, Inc., 681 F. Supp. 27, 34-36 (D.C. 1988), *vacated on other grounds*, 850 F.2d 694 (D.C. Cir. 1988); Science Products Co. v. Chevron Chemical Co., Inc., 384 F. Supp. 793, 797-98 (N.D. Ill. 1974).

[116] *Continental Can*, 378 U.S. at 452.

[117] *Id.* at 453-55 (footnote omitted).

67. Our assessment of the commercial mobile radio services marketplace[118] leads us to conclude that the types of competitive relationships described in *Continental Can* exist between reclassified private services and other existing commercial services:

- Some services, such as private carrier paging and common carrier paging, have been and continue to be in direct competition with each other. Each service is trying to expand its market share at the expense of the other.

- Direct competition between services based on similar functionalities provided by the services, *i.e.*, cellular service and wide-area SMR service, has also begun and is likely to grow.

- Other services, such as one-way paging, are competing against other commercial mobile services for at least some customers, even though currently there are demonstrable differences in the features and functions of the competing services.

- Still other services, such as local SMR, 220 MHz offerings, and Business Radio Service, have the potential to compete with other commercial mobile offerings as technology evolves and the offerings begin to gain commercial acceptance.

68. With regard to all of these competitive relationships, "though the interchangeability of use may not be . . . complete and the cross-elasticity of demand [may] not [be] immediate[,]"[119] we believe that reasonable conclusions and expectations regarding customer demand and technological innovation support our conclusions regarding CMRS competition.

(ii) ***Technological Innovation***

69. In addition to our assessment that existing CMRS licensees all compete to meet subscriber needs to transmit or receive communications while on the move, it is important to consider the potential for competition among CMRS providers due to technological innovation. We believe that in the climate of rapid technological innovation and dynamic growth in the mobile services marketplace, all CMRS providers should have the potential to utilize any CMRS spectrum in a manner that can adapt the nature of the service they provide to meet specific customer needs. Our current regulations have allowed various CMRS licensees to

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[118] We have limited our assessment to the current mobile services marketplace and do not include PCS because there are no licensed PCS providers with operational systems. We recognize, however, that in the near future, PCS licensees may offer services in competition with existing CMRS providers, *e.g.*, two-way voice, data and messaging services, and paging services.

[119] *Continental Can*, 378 U.S. at 455.

employ new technologies to offer services, other than their traditional service, that meet particular customer demands.[120] Thus, even if CMRS providers offer differing services today, if consumers desire particular services or combinations of services in the future, a variety of CMRS providers should have the opportunity to use different technological configurations to meet this customer demand in competition with other CMRS carriers. As explained earlier,[121] examining potential competition, in addition to current competition, serves the Commission's objectives of creating an enduring regulatory regime under which substantially similar services are subject to symmetrical regulation and the marketplace shapes the development of mobile services to meet customer demands.[122]

70. We also find support in antitrust law and policy for examining potential competition. For example, the horizontal merger guidelines state that in identifying firms that participate in the relevant market, DOJ and the FTC will identify other firms not currently producing or selling the product involved in the relevant area if their inclusion would more accurately reflect probable supply responses. These firms are called "uncommitted entrants."[123] The guidelines explain that uncommitted supply responses may occur in different ways: (1) by the switching or extension of existing assets to production or sale in the relevant market; or (2) by the construction or acquisition of assets that enable production or sale in the relevant market.[124]

71. In addition, the courts, in applying U.S. antitrust laws, have recognized that one product, and another that might compete with it if prices were changed, can be included in the same product market. Courts have said that "defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability -- actual or potential -- to take significant amounts of business away from each other."[125] In *FTC v. Procter & Gamble,*[126] for example, the Court

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[120] The best example of this phenomenon is the development of wide-area SMR systems. *See* paras. 72-73, *infra.*

[121] *See* paras. 39-41, *supra.*

[122] *See Continental Can*, 378 U.S. at 455 ("long run . . . customer response to innovation and other competitive stimuli . . . brings the competition between these two industries within [the relevant market for Clayton Act purposes]").

[123] *1992 Merger Guidelines* at § 1.32, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20,573-3.

[124] *Id.* at § 1.32, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20,574-3.

[125] SmithKline Corp. v. Eli Lily & Co., 575 F.2d 1056, 1063 (3d Cir. 1978), *cert. denied,* 439 U.S. 838 (1978) ("A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market."); *see also* General Industries Corp. v. Hartz Mountain

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agreed with the FTC that the acquisition of Clorox by Procter & Gamble (Procter) violated Section 7 of the Clayton Act because the merger eliminated Procter as a potential competitor to other liquid bleach producers. The Court found, *inter alia,* that "Procter was engaged in a vigorous program of diversifying into product lines closely related to its basic products. Liquid bleach was a natural avenue of diversification since it is complementary to Procter's products, is sold to the same customers through the same channels, and is advertised and merchandised in the same manner."[127] Thus, the Court concluded, "[i]t is clear that the existence of Procter at the edge of the industry exerted considerable influence on the market."[128] In *FTC v. Owens-Illinois, Inc.,*[129] the court said that most users of glass containers had reasonable alternatives if the price of glass containers rose. The court examined extensively specific end uses for glass containers[130] and then concluded that a combination of new and existing technologies, products, marketing, and changing consumer preferences indicate that all but a few end use segments have a largely elastic demand for glass. Thus, the court found that the relevant product market in which to assess the merger between two competing glass container manufacturers was rigid wall containers, including glass, plastic, metal, and paper.[131]

72. There is evidence that supply-side substitutability of the type described in *Procter* and *Owens-Illinois* is present in the CMRS marketplace -- it is reasonable to conclude that changing technology and flexible regulation have allowed mobile service licensees to use existing spectrum allocations to provide innovative services, in competition with providers licensed under different rules, to respond to customer demands. Wide-area, digital SMRs offer a prime example of this phenomenon. In 1990, Fleet Call, Inc. (now Nextel) filed a petition for waiver and other relief to permit creation of wide-area, digital SMR systems in six markets.[132] The Commission concluded, however, that our rules already afforded Fleet

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[125](...continued)
Corp., 810 F.2d 795, 805 (8th Cir. 1987); U.S. Anchor Mfg. v. Rule Industries, 7 F.3d 986, 995 (11th Cir. 1993).

[126] 386 U.S. 568 (1967).

[127] *Id.* at 580.

[128] *Id.* at 581.

[129] 681 F. Supp. 27, 45-46 (D.D.C.), *vacated on other grounds,* 850 F.2d 694 (D.C. Cir. 1988).

[130] *Id.* at 38-46.

[131] *Id.* at 46.

[132] Fleet Call, Inc., 6 FCC Rcd 1533 (1991) (*Fleet Call*). The Fleet Call proposal was to combine all of its channels in each market into a multi-site, low-power base station configuration employing
(continued...)

Call most of the latitude it required to construct wide-area, digital SMR systems. Therefore, we granted only a waiver of the one-year construction requirement for trunked SMRs.[133] Today, there is general agreement that wide-area SMR service is developing as a competitor to the cellular industry.[134] Nextel has successfully begun offering wide-area digital SMR service in competition with cellular carriers in California markets.[135]

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[132](...continued)
digital technology and frequency reuse throughout the system. Fleet Call claimed that its system would offer greater capacity which would improve capacity to interconnect to the public switched network, allow for automatic hand-off of calls as mobile units travel throughout a market area, and offer location-specific sub-fleet or single mobile dispatch services in which a dispatcher identifies the specific mobile units closest to a desired location and calls only those units. *Id.* at 1533-34.

[133] *Id.* at 1538 (para. 36). A trunked system is a method of operation in which more than one radio frequency channel pairs are assigned for use by any mobile and base stations in the system. *See* 47 CFR § 90.7.

[134] *See* note 39, *supra.* In addition to the record established in this proceeding, other information supports our conclusion that wide-area SMR operators are in competition with cellular carriers. "It is our assessment that cellular telephone and digital ESMR will become direct competitors in a normalized marketplace (i.e., ex-construction and acquisitions)." Smith Barney Shearson, Bulletin: Initiating Coverage on the Wireless Industry, Jan. 13, 1994. "[T]he three largest specialized mobile radio operators -- Nextel, OneComm Inc. and Dial Page Inc. -- have positioned themselves to provide a viable alternative to cellular service." "Cellular Stocks Surging," *Radio Communications Report*, Apr. 11, 1994, at 43. "Aggressive companies hoping to offer Enhanced SMR service, which will compete against cellular service for mainstream customers, are establishing their game plans." "Recent Frenzy of Consolidations Reshaping Bold New SMR World," *Radio Communications Report*, Nov. 8, 1993, at 1, 21. *See* "Nextel To Buy Wireless Competitor," Washington Post, Aug. 6, 1994, at D1 (Nextel acquisitions move toward creation of nationwide network to compete with cellular operators).

[135] Nextel began ESMR service in Los Angeles in early 1994 with 125 base stations. Nextel also plans to begin providing ESMR service in New York and Chicago in 1994. "MCI To Buy 17 Percent of Nextel, Will Market Wireless under MCI Brand Name," *PCIA Bulletin*, Mar. 4, 1994, at 5. Nextel also has announced commercialization of its all-digital, integrated wireless network in the San Francisco Bay area and in California's Sacramento Valley. "Together with the recently inaugurated network in Los Angeles [and networks scheduled for central California and San Diego], these systems will provide integrated telephone, private network dispatch radio, paging and messaging services throughout most of the state of California." Business Wire, July 8, 1994. "Nextel Communications Inc. has commercialized its fully digital network in Los Angeles. The company is expanding the network to northern California and the Central Valley . . . ." Nextel also has ordered $200 million in infrastructure equipment to expand the system to San Diego, New York, Chicago, Boston, Detroit, Baltimore, and Washington, D.C., before the end of 1994. The Los Angeles system has approximately 1,000 paying subscribers. "Nextel Starts Full Commercial Service in Southern California," *PCIA Bulletin*, May 20, 1994, at 10. There have been reports that the "breakneck" expansion of Nextel has
(continued...)

73. Moreover, other SMR operators also are positioning themselves to compete against cellular carriers.[136] Although many local SMR licensees primarily provide dispatch service, all SMR licensees that are classified as CMRS offer service that is interconnected to the public switched network. Therefore, these licensees have the potential to compete with cellular carriers if they acquire a sufficient amount of spectrum and employ digital technology. For example, many existing local SMR licensees have made filings in this proceeding criticizing Nextel's proposal for wide-area SMR licensing because they believe the Nextel proposal would preclude them from offering wide-area digital SMR service.[137]

74. Another aspect of technological innovation affecting competition in the CMRS marketplace involves an increasing demand for data services.[138] CMRS providers that

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[135](...continued)
caused it some "growing pains," and that the company has faced supply shortages of new wireless telephones for the operations Nextel has activated in California. "Nextel Taps Xerox's Hicks for Top Posts," Wall Street Journal, July 27, 1994, at B7.

[136] "Pittencrieff claims it competes directly with cellular carriers in its markets for interconnected service to the [PSN]. . . . But unlike other fast growing regional SMRs that are beginning to challenge cellular carriers, Pittencrieff is avoiding large metropolitan markets and has no immediate plans for conversion from analog to digital technology." "Pittencrieff Communications Sets Offering To Fund Growth," *Radio Communications Report*, June 21, 1993, at 22.

[137] *See, e.g.*, Letter from J. Cutshaw, Jr., to Secretary, FCC, filed July 8, 1994; Letter from DCL Associates, Inc., to Secretary, FCC, filed July 8, 1994; Letter from W. Keith, to Secretary, FCC, filed July 8, 1994; Letter from B. Pratt, to Secretary, FCC, filed July 8, 1994; Letter from J. Robbins, to Secretary, FCC, filed July 8, 1994. Letters regarding the proposal in Nextel's comments have been placed in GN Docket No. 93-252.

[138] "Wireless data services have assumed growing importance in the mobile radio industry. Approximately one-half of the operators surveyed were offering some type of mobile data service, compared with about 45% in 1992." L. Smith, "1994 *Telocator* Almanac of Wireless Communications Markets," *Telocator*, Jan. 1994, at 26 (citing survey conducted by Economic and Management Consultants International, Inc.) "[I]t is reasonable to conclude that data applications will drive the growth of wireless usage by business. . . . Overall, almost two-thirds of the respondents see substantial growth in data versus only 20% for voice. Respondents . . . identified wireless capabilities which they prefer in any system they adopt. These included . . . full two-way capability ([a preference of] 74% [of respondents]) -- as opposed to outgoing only or outgoing with incoming paging capability . . . ." *Mobile Product News*, 1993 Executive Report: The Impact of Mobile and Wireless Communications on Business, at 10-11 (undated). The information in the report was gathered as part of the Telecommunications and Electronic Services Program of Deloitte & Touche. The survey explored the views of nearly 7,000 chief information officers and other senior managers with responsibility for purchasing telecommunications products and services. Over 50 percent of the business users surveyed were located in the United States. *Id.* at 4. *See* S&P Survey at T40 ("Growth of the [mobile data services] market is anticipated to be rapid. Dataquest, a San Jose market research
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traditionally offered voice service are using new technology to offer data services. For example, cellular carriers have developed cellular digital packet data (CDPD) systems to provide data services.[139] "Although voice transmission accounts for the vast majority of current cellular revenues, many industry observers predict that within the next six years data transmission will account for about one-half of all cellular revenues, amounting to more than 10 million users."[140] These data services will compete with more traditional data services offered by other CMRS licensees,[141] and they will face competition from newer technolo-

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[138](...continued)
firm, estimates that revenues from wireless data networks could surge to $2 billion in 1998 on 3.4 million customers, from the $260 million market serving 380,000 customers in 1993.").

[139] Bell Atlantic Mobile "announced the start of commercial Cellular Digital Packet Data (CDPD) service that it hopes will be the start of an overall wireless data business including circuit switched data generating as much as one-fifth of its revenues by 2000. The 'AirBridge Packet Service' is available in the Baltimore/Washington and Pittsburgh markets for reasonable packet fees that are competitive with existing offerings . . . from Ardis or RAM Mobile Data. . . . BAM's major and national corporate accounts are asking for wireless data along with a variety of mobile services such as cellular voice and paging 'and we intend to deliver them all,' [Dennis Strigl, president and CEO of BAM] says." "BAM Predicts up to 20 Percent of Revenues from Data by 2000," *Mobile Data Report*, May 9, 1994, at 4. McCaw Cellular is developing a CDPD system that will be capable of a variety of applications. "CDPD provides a fast system -- its raw speed is 19.2 kilobits per second -- and from the carriers' point of view it offers the advantage of being an add-on to their existing cellular infrastructure." "Comdex Gives Industry Buffs a Taste of Wireless Data Communications," *Telocator Bulletin*, Nov. 19, 1993, at 8. *See also* Moran & Weinstein at 6:

> Late 1994 should welcome the introduction of Cellular Digital Packet Data (CDPD), packet-switching technology, which uses the intervals between voice traffic on cellular channels to send packets of data, rather than tying up specifically dedicated cellular channels. The development of wireless data applications will lead to such offerings as wireless fax, E-mail and on-line database services. Data delivery over cellular results in favorable coverage, capacity, reliability, and low-cost structure advantages relative to dedicated wireless data operators, which may more be suitable for users requiring less robust services.

[140] U.S. Industrial Outlook 1994 -- Telecommunications Services, at 29-15.

[141] "CDPD, backed by eight major cellular carriers, will compete against Ardis Co. and Ram Mobile Data Inc., the country's two wide-area metropolitan data network operators." "Data Rivals Trade Barbs in Battle for Competitive Edge," *Radio Communications Report*, June 21, 1993, at 1. "Mobile data operators, such as ARDIS, RAM and the cellular industry, are investing hundreds of millions of dollars in infrastructure and product development in hopes of capturing the expected burgeoning mobile data market. . . . [H]owever, . . . paging services, especially alphanumeric paging, currently meet many companies' mobile data needs and are well positioned to continue to be a dominant player in the mobile data marketplace." E. Hamilton & S. Virostek, "Paging: Stepchild or Cinderella of Mobile Data?" *Telocator*, May 1993, at 8.

gies.[142] On the other hand, CMRS providers who traditionally have offered data services may use new technologies to offer voice services.[143] New entrants to the CMRS marketplace, such as 220 MHz licensees, also will use a variety of technologies to provide both voice and data

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[142] "US West is concerned that upcoming digital cellular technologies will surpass CDPD before it can even be commercially implemented. . . . Any digital system . . . could offer much higher data rates than CDPD, [according to Allyn Hall, director-wireless data at US West NewVector]." "BellSouth, US West Keeping an Eye on CDPD Development," *Radio Communications Report*, Feb. 28, 1994, at 16.

[143] Motorola has announced its plans to acquire IBM's 50 percent interest in the Ardis wireless data network. The four-year-old Ardis venture currently has approximately 40,000 customers. Bob Growney, president and general manager of Motorola's Messaging, Information, and Media Sector, stated that the Motorola investment illustrates the company's commitment to the two-way wireless data industry. There also is the possibility that Motorola will follow the strategy of using the Ardis network to provide voice as well as data. "'If Motorola . . . adds voice, Ardis starts to look like a third cellular carrier,' pointed out Richard Siber, director of wireless communications for Anderson Consulting." "Motorola To Acquire IBM's 50 Percent Share of Ardis," *PCIA Bulletin*, July 8, 1994, at 2-3. Ardis provides data systems in more that 400 metropolitan areas and ranks among the first commercial wireless packet data providers. *Id.*

services.[144] Carriers using 220 MHz spectrum have the potential, for example, to compete with cellular carriers in providing package tracking systems.[145]

75. Technological innovation also affects competition by providing CMRS licensees with the ability to offer an array of mobile services to customers. The development of new equipment allows CMRS providers to offer a package of services that all use the same piece of equipment. For example, new digital mobile telephones integrate pagers.[146] This allows wide-area SMRs to offer mobile telephony, dispatch service, and paging service.[147] Many

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[144] "'Equipment for 220 MHz has greater data capabilities [than equipment for 800 MHz SMR trunking]. The technology also makes more efficient use of the spectrum. . . . The 220 band has all the advantages of today's SMR plus data and capacity improvements. The [220 MHz] band is geared heavily toward dispatch users that also have a need for telephone interconnect. . . . I believe dispatch on ESMR is not going to be practical or economical. The 220 band will be more economical for a large dispatch user – fleet trucks, construction and delivery services." "E.F. Johnson's Jeff Fuller Describes 220 MHz from Equipment Vendor's View," *Land Mobile Radio News*, Apr. 29, 1994, at 6 (quoting Jeff Fuller, vice president for marketing, E.F. Johnson). Growth of approximately $700 million is projected for the 220 MHz market over the next five years. Operators are concentrating on high-quality dispatch service. Initial propagation studies show 220 MHz channels providing excellent quality in comparison to 800-900 MHz systems. E.F. Johnson is expected to be a significant early market entrant, having consolidated a block of 50 to 100 channels in most top-20 metropolitan markets. "Many operators are interested in offering such basic data services as fax and messaging, but are delaying development of these services until they have a core subscriber base using dispatch services . . . . 'New 220 MHz operators will attempt to compete with entrenched cellular carriers, SMR operators and future mobile services such as PCS . . . .'" "Court's Pending Decision Could Trigger Race in 220 MHz Market," *Land Mobile Radio News*, Jan. 14, 1994, at 3 (quoting from "The State of SMR and Digital Mobile Radio," a 1993 study conducted by Malarky-Taylor Associates/EMCI and AMTA). "Marcia Miller, director of marketing for 220 MHz at Uniden of America Corp., explains [that] '[w]ith modern modulation techniques, it is possible to get excellent voice quality [with 220 MHz] in an extremely narrow bandwidth signal.'" "Technology: New Product Bonanza," Communications, Dec. 1993, at 27.

[145] "Technology: New Product Bonanza," Communications, Dec. 1993, at 27.

[146] "Digital capability allows a cellular operator to offer integrated paging (including vibrating alerts) into very small portables. The next step will be offering a separate but integrated pager with each phone sale." P. Partridge & L. Smith, "Trends in the Paging and Cellular Industries," *PCIA Journal*, Feb. 1994, at 26.

[147] Nextel claims that its wide-area SMR services provides customers with mobile telephone, paging, and dispatch services all in a single handset along with improved clarity and reception and a host of enhanced features. Nextel Comments at 4. Nextel's wide-area SMR system (called ESMR by Nextel) in Los Angeles is based on a Motorola Integrated Radio System which "can be used to provide four services: mobile telephone, enhanced dispatch, short messaging (a form of paging), and wireless data transmission. Moreover, the customer can access all of these services through a single

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cellular companies are responding with similar, integrated service offerings.[148] Another example of this phenomenon is the development of equipment such as a facsimile reader, using "virtual display" technology, for use with cellular phones and pagers.[149] The ability to offer a combination of services allows a CMRS provider to compete with a greater number of other CMRS providers.[150]

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[147](...continued)
subscriber unit. . . . These improved features are important because they allow ESMR service providers to compete head-to-head with cellular systems." D. Hatfield, "MIRS Under the Microscope," *Business Radio*, Feb. 1994, at 19. Motorola has introduced a new phone for wide-area SMR subscribers that will enable them to utilize voice, alphanumeric paging, data transmission, and dispatch services. The phones feature a menu-driven screen, automatic answer, call waiting, speed dialing, and call forwarding. Sixteen 140-character text messages can be stored. The phones also are equipped with internal modems for data transmission. Voice dispatch capabilities include unlimited group calling, private conversation, and call alert. "Motorola Introduces 'Lingo,' with Four Functions in One ESMR Phone," *PCIA Bulletin*, Apr. 15, 1994, at 8.

[148] "In response to Nextel Communications' launch of commercial Enhanced SMR service in Southern California, AirTouch Cellular has introduced new integrated paging and voice mail services on its analog cellular systems in San Diego and Sacramento, Calif. It plans to introduce the services in the Los Angeles market later this year . . . ." The AirTouch service package will allow cellular subscribers to consolidate their services into a single phone. AirTouch seeks to respond to the fact that "the digital technology of Nextel's Enhanced SMR systems allows it to provide alphanumeric paging, known as 'short messaging,' along with mobile voice and data services." "AirTouch Cellular Adds Digital-Type Messaging to Purely Analog Systems," *PCIA Bulletin*, June 3, 1994, at 7. The cellular and paging subsidiaries of BellSouth recently introduced a new class of "personal digital assistant" that combines a cellular phone, pager, fax transceiver, and organizer. The LCD screen of the phone displays numeric pages, which can be sent over the cellular system or MobileComm's network. (MobileComm is the paging arm of BellSouth.) "BellSouth Introduces 'Simon' for Cellular, Paging, Wireless E-Mail," *Telocator Bulletin*, Nov. 5, 1994, at 5.

[149] Fax messages comprise 12 percent of wireline communications, but only about 0.1 percent of cellular traffic. Reflection Technology Inc. believes that the scanned linear array display used with its fax reader will make the remote retrieval of fax messages practical and affordable. "Reflection Technology Introduces Its 'Virtual Display' to Cellular Industry," *PCIA Bulletin*, Mar. 4, 1994, at 6.

[150] *See* AMTA Reply Comments at 14. Trade press reports further illustrate this point. "[P]aging operators of all sizes, even the very largest, should be aware of new competition from three other areas: 1. Cellular operators will also offer paging, 2. PCS telephones will offer built-in pagers, 3. Enhanced specialized mobile radio (SMR) operators who offer paging." J. Rapp, "Paging: Balancing Short-Term Profits with Long-Term Potential," *Business Radio*, June 1994, at 16. "A study by Nextel on its existing dispatch customer base shows 64 percent of users have cellular phones in addition to SMR dispatch, and another 53 percent of Nextel's customers use paging services. 'We can offer them all those services with one handheld device,' said McAuley, [Nextel's president]." "Nextel Hits SMR Mother Lode in Deal for Motorola Systems," *Radio Communications Report*,
(continued...)

76. It also is important to note that at least one factor that may increase the potential for competition results from regulatory changes rather than technological innovation. The Communications Act prohibits common carriers from providing dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982, or the common carrier was treated as a private land mobile service providers prior to the Budget Act.[151] The Act, however, grants the Commission authority to terminate the prohibition, in whole or in part, if it is in the public interest.[152] This issue was raised in the first Notice in this proceeding, but the Commission concluded that we needed a definitive record to evaluate this issue.[153] Therefore, the Commission recently requested comment on whether to lift the prohibition on common carriers providing dispatch service.[154]

77. Before turning to the issue of the relationship between our findings regarding substantial similarity and the conformance of our existing technical and operational rules, we reiterate our conclusions regarding the basis for our findings. In the previous section we assessed documentation regarding the state of competition in the CMRS marketplace and concluded that a significant degree of competition already exists among various existing and reclassified common carrier mobile radio services. In this section, we examined trends in the CMRS marketplace, particularly with regard to technological innovation and regulatory policies, and concluded that these trends illustrate a strong potential for further competition among all CMRS services. These two conclusions, taken together, buttress our view that all reclassified private services should be defined as substantially similar to existing commercial offerings.

(2) *Technical and Operational Rules*

78. It is important to explain the effect of our decision that all commercial mobile radio services are "substantially similar" to each other on our subsequent analysis of existing technical and operational rules. First, the statute requires the Commission to alter technical and operational rules "as may be necessary and practical."[155] Therefore, in the following

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[150](...continued)
Nov. 22, 1993, at 3. *See* note 139, *supra*, regarding the offering of "AirBridge Packet Service" by Bell Atlantic; para. 61, *supra,* regarding Bell Atlantic Mobile's combined paging and cellular offering.

[151] Communications Act, § 332(c)(2), 47 U.S.C. § 332(c)(2).

[152] *Id.*

[153] *CMRS Second Report and Order,* 9 FCC Rcd at 1455-56 (para. 105).

[154] *See Dispatch Notice.*

[155] Budget Act, § 6002(d)(3)(B).

sections, we will determine whether to alter technical and operational rules based upon whether changes are necessary and practical to achieve our stated goals: regulatory symmetry and a competitive CMRS marketplace. If we find that a particular Part 90 service has a technical or operational rule that is different from a Part 22 rule, we will examine whether changing the Part 90 or Part 22 rule will assist us in achieving our stated goals. If such a change would thwart, rather than facilitate our purpose, then we will not adopt that rule change.

79. Second, we do not believe that all substantially similar services must have identical technical and operational rules, especially if the imposition of such identical rules would require carriers to reconfigure their services in ways that could adversely affect their ability to compete. Rather, our goal is to give carriers offering substantially similar services the flexibility to compete in whatever manner they choose. Thus, we are adopting technical and operational rules that are intended to be sufficiently flexible to enable licensees to respond to changing customer needs and demands. This approach is consistent with our statutory mandate to assure, to the extent necessary and practical, that substantially similar services are subject to ''comparable'' technical requirements. Many commenters support this approach.[156] This flexibility will allow CMRS providers to respond to the needs and demands of consumers. Therefore, we are revising our technical and operational rules to afford the maximum flexibility consistent with protecting licensees from interference by other operators.

C. Technical and Operational Rules

80. The Budget Act requires the Commission to modify its rules, to the extent ''necessary and practical,'' to ensure that substantially similar services are subject to ''comparable'' technical requirements.[157] As we mentioned in the *Further Notice*, the Budget Act also confers substantial discretion on the Commission to determine how this objective should be accomplished.[158] The statutory language indicates that the Commission is not compelled to modify existing rules if such modification is unnecessary to achieve regulatory symmetry or is otherwise impractical. In addition, even where the Commission determines that inconsistencies in Part 90 and Part 22 should be conformed, the statute does not compel the rigid application of a uniform rule but affords the Commission discretion to fashion ''comparable'' rules.

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[156] *See, e.g.*, BellSouth Comments at 4-5 (urging the Commission to apply the least restrictive of the relevant service specific rules); GTE Comments at 6-7; NABER Comments at 5-6. In particular, many commenters encourage the Commission to extend the flexibility of our PCS rules to all CMRS licensees. *See, e.g.*, Bell Atlantic Comments at 4-5; Bell Atlantic Reply Comments at 3; CTIA Comments at 2-3; GTE Comments at 4-6.

[157] Budget Act, § 6002(d)(3).

[158] *Further Notice*, 9 FCC Rcd at 2864-69 (paras. 1-22).

81. The *Further Notice* focused primarily on identifying and conforming differences in technical and operational rules in Part 90 and Part 22 that may otherwise lead to arbitrary and inconsistent treatment of substantially similar CMRS licensees. The *Further Notice* also sought to address whether these technical and operational rules should be fashioned to ensure a basic level of consistency with our PCS rules, which potentially provide another avenue for the development of CMRS applications that are ''substantially similar'' to existing Part 22 and Part 90 services.[159]

82. We stated that we would be attentive to whether various options might have effects on the future course of competition between providers of substantially similar services. We also stated that we would assess whether a rule revision would harm competition.[160] In those instances where it is determined that changes to technical and operational rules could promote competition, the *Further Notice* also sought comment on the extent to which it would be ''necessary and practical'' at this time to revise specific technical and operational rules to ensure that licensees in reclassified private land mobile services and licensees who provide ''substantially similar'' common carrier services are subjected to comparable technical requirements. We also stated that there may be instances where the Commission should not change existing rules, either because the differences in the rules applicable to competing services have a reasonable basis unrelated to competitive considerations or because changing the rules would be impractical.[161]

83. Commenters generally support our proposals to conform Part 22 and Part 90 technical and operational rules. Commenters also suggest that these rules should be made consistent with our rules for PCS[162] or PMRS,[163] maximize flexibility,[164] take into account the differences between shared and exclusive use of frequencies,[165] and reflect recent changes in the SMR industry, including the number of mergers and license applications filed.[166]

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[159] *Id.* at 2868-69 (para. 22).

[160] *Id.* at 2869 (para. 23).

[161] *Id.* (para. 24).

[162] *See, e.g.*, Vanguard Comments at 9; Bell Atlantic Comments at 3-4; GTE Comments at 4, 6.

[163] *See, e.g.*, RAM Tech Comments at 9.

[164] *See, e.g.*, BellSouth Comments at 12-13; PCIA Comments at 14.

[165] *See, e.g.*, Celpage Comments at 6.

[166] *See, e.g.*, OneComm Comments at 5-7.

ITA/CICS counsels that we should try to implement rule changes without significant disruption to existing services.[167]

1. *Technical Rules*

a. Channel Assignment and Service Area

84. In the *Further Notice*, we observed that there is significant variation among both Part 22 and Part 90 mobile radio services in our regulations governing the amount of spectrum assigned to and the geographic area to be served by each licensee. We accordingly identified as a key goal of this proceeding the determination of whether our channel assignment rules should be revised so that reclassified Part 90 services are treated in a comparable manner to "substantially similar" common carrier services.

(1) *800 MHz SMR*

(a) Background and Pleadings

85. The *Further Notice* sought comment on whether our channel assignment rules for 800 MHz SMR should be revised to facilitate licensing on a wide-area basis comparable to our licensing of cellular and broadband PCS spectrum.[168] We observed that SMR licensees attempting to construct wide-area multi-channel systems under our existing rules face significant competitive obstacles because channel assignment is on a station-by-station, channel-by-channel basis. On the other hand, we noted that many SMR licensees operate traditional dispatch systems that do not require wide-area, multi-channel assignments. Because of the varied nature of 800 MHz SMR services, we sought comment on how to ensure that rule changes intended to eliminate obstacles to wide-area licensing would not disrupt other segments of the SMR industry and the services they provide.[169]

86. The *Further Notice* also sought specific comment on the continued viability of our MTA-based licensing proposal originally proposed in the *800 MHz EMSP Notice*.[170] We tentatively concluded in the *Further Notice* that a wide-area alternative was both feasible and consistent with the goal of achieving comparable technical rules for substantially similar services. In light of the fact that the 800 MHz SMR band is heavily occupied, however, we

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[167] ITA/CICS Comments at 6.

[168] *Further Notice*, 9 FCC Rcd at 2870 (para. 29).

[169] *Id.* (para. 30).

[170] *Id.* (para. 31). *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Notice of Proposed Rule Making, PR Docket No. 93-144, 8 FCC Rcd 3950 (1993) (*800 MHz EMSP Notice*).

sought comment on whether the amount of available spectrum was sufficient to support MTA-based multi-channel licensing or whether some other alternative, such as licensing based on self-defined service areas, should be considered.[171]

87. The comments broadly support establishment of a wide-area licensing scheme for 800 MHz SMR systems to enhance their ability to compete with cellular and broadband PCS. AMTA, for example, states that wide-area SMR systems will provide a service substantially similar to cellular and that therefore the Commission should "endeavor to craft technical and operational rules for this service which will ensure that it will not be 'regulatorily impaired' in the marketplace."[172] Pittencrieff similarly asserts site-specific, channel-by-channel licensing of SMR systems is "an inefficient method of licensing" that places wide-area SMR licensees at a "serious disadvantage in the marketplace when competing with cellular and PCS systems."[173]

88. The comments reflect some disagreement, however, as to whether wide-area licensing should be based on licensee-defined or Commission-defined service areas. PCC favors licensee-defined areas, arguing that this approach combined with a "take-back" mechanism for unconstructed areas would result in efficient spectrum utilization.[174] Southwestern Bell, on the other hand, opposes licensee-defined service areas on the grounds that it would provide an unfair competitive advantage to wide-area SMR operators over cellular and PCS carriers, who may only serve "pre-defined" service areas.[175] OneComm also favors Commission-defined areas of operation, noting that the "cumbersome licensing procedures that are in place for SMRs and ESMRs today encourage the filing of massive numbers of applications by operators attempting to protect their systems from interference from others" and that a geographically-based licensing scheme would solve this problem and enable the Commission to more efficiently utilize its resources.[176] AMTA supports the use of MTA-wide authorizations, observing that objectively defined geographic boundaries "will enable licensees to know with certainty from the outset within which specific area they are entitled to the use of [their] . . .channels."[177]

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[171] *Further Notice*, 9 FCC Rcd at 2870-71 (paras. 32-33).

[172] AMTA Comments at 14.

[173] Pittencrieff Comments at 5.

[174] PCC Comments at 5.

[175] Southwestern Bell Comments at 9.

[176] OneComm Comments at 4-5.

[177] AMTA Reply Comments at 19.

89. While many commenters favor wide-area licensing, many also stress that any such plan must take into account the needs of other segments of the SMR industry. United States Sugar recommends that we retain our existing channel assignment rules for traditional SMR systems while establishing a different licensing mechanism for licensees who wish to provide multi-channel, wide-area service, and suggests that any new rules take into account the "expansion needs of traditional SMRs."[178] RMR notes that "traditional SMRs . . . will likely continue to team up with each other in order to be more competitive,"[179] and that "[t]o the extent the traditional SMR is able to obtain, or form alliances with other SMR operators to mass the necessary frequencies to implement a pseudo-wide-area system, it should be allowed to do so."[180] Finally, NABER believes that one of the goals of a service-area based licensing approach should be to enable small SMRs to "continue to operate and have access to spectrum for growth where available."[181]

90. Many of the comments regarding 800 MHz SMR focus on a specific plan for wide-area licensing introduced by Nextel in its initial comments, and somewhat modified in its reply comments.[182] Nextel proposes that we establish a contiguous 10 MHz channel block of 200 SMR channels (Channels 401 to 600) for exclusive use by a single wide-area SMR licensee in each MTA. Nextel argues that this amount of spectrum is the minimum necessary to provide wide-area SMRs with a broadband allocation comparable to that available to cellular providers.[183] Nextel further argues that the assignment of contiguous channels is essential for the introduction of broadband technologies, such as spread spectrum, which it contends are only feasible for licensees with contiguous blocks of spectrum.[184] To clear the

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[178] US Sugar Comments at 10.

[179] RMR Comments at 4.

[180] RMR Reply Comments at 17.

[181] NABER Comments at 13.

[182] In its initial comments, Nextel proposed that eligibility for each MTA license should be limited to existing SMR licensees who had received wide-area authorizations as of August 10, 1994. If more than one licensee in an MTA qualified under this standard, qualified licensees would have three months to negotiate the selection of a single MTA licensee or the Commission would assign channels on a pro-rated basis according to the number of mobiles served by each licensee. Nextel Comments at 17-18. In its reply comments, Nextel revised its plan by proposing that: (1) only one wide-area SMR license be awarded in each MTA; (2) no time limit be placed on negotiations among eligible licensees; and (3) if the various eligible parties within an MTA were unable to agree on a single entity that would hold the MTA license, they would continue to operate under their existing licenses and no MTA license would be awarded. Nextel Reply Comments at 13.

[183] Nextel Comments at 11.

[184] Nextel Reply Comments at 16.

200-channel block for wide-area use, Nextel proposes that existing SMR stations on these channels be required to ''retune'' their equipment to operate on other 800 MHz channels for which SMRs are eligible. The cost of retuning, which Nextel claims would not be significant, would be paid by the wide-area licensee, and no licensee would be forced to move off its frequencies unless acceptable alternative frequencies were available.[185]

91. The Nextel plan elicited widespread comment both in favor and in opposition to the proposal. AMTA, Dial Page, CellCall, and OneComm support the Nextel plan as revised in the reply comments. These commenters stress the importance to wide-area SMR licensees of obtaining a clear, contiguous band of spectrum if they are to compete against cellular and broadband PCS licensees with even larger spectrum blocks. OneComm further requests that wide-area SMRs not be excluded from access to SMR channels other than the 200 channels in the ''MTA block.'' OneComm notes that these additional channels may be necessary either for wide-area operations or for retuning co-channel licensees.[186]

92. Numerous commenters, including many operators of smaller SMR systems, oppose the Nextel plan. PCC asserts that the demand for wide-area SMR service does not justify the allocation of 200 channels to a single licensee, and that opportunities should exist for more than one new entity in an MTA to provide wide-area SMR services.[187] Action similarly comments that Nextel should be required to compete with other applicants to provide wide-area service, and that auctions should be used to select wide-area licensees where applications are found to be mutually exclusive.[188] T&K expresses concern that adoption of the Nextel proposal will jeopardize its pending application for frequencies in the ''MTA block,''[189] while JMTV indicates that removing smaller SMR systems to lower frequencies would deprive them of the ability to build ''enhanced'' systems to compete with larger firms such as Nextel.[190]

93. The most vigorous objections to Nextel's plan concern the proposal that existing licensees in the ''MTA block'' of 200 channels be required to move to other frequencies. Eden argues that Nextel has failed to address the practical problems to be encountered by these licensees ''in terms of equipment replacement, management agreements, renegotiation

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[185] Nextel Comments at 11-12.

[186] OneComm Reply Comments at 6-7.

[187] PCC Reply Comments at 4-5.

[188] Action Reply Comments at 3.

[189] T&K Reply Comments at 3.

[190] JMTV Reply Comments at 1.

of site leases,'' and the like.[191] Ericsson contends that there are no 800 MHz trunked SMR channels available in most markets and that SMR operators who are required to retune would therefore be forced to compete for a limited number of conventional SMR channels.[192] Finally, NABER opposes mandatory relocation (although it supports other aspects of the Nextel plan) on the grounds that insufficient alternative spectrum is available and that mandatory relocation would impair the ability of small existing analog SMR systems to convert to wide-area operation.[193]

(b) Discussion

94. Based on our earlier analysis of ''substantially similar'' services (*see* Section III.B, *supra*), we conclude that 800 MHz SMR licensees compete or have the potential to compete with existing wide-area CMRS service providers. We further conclude that we should modify our existing channel assignment rules and service area definitions, to the extent practicable, to permit 800 MHz SMR licensing on a wide-area basis because we have determined that such licensing will promote competition between 800 MHz SMR licensees and other CMRS licensees. We also conclude that any wide-area licensing plan must take into account the interests of existing and future SMR systems that do not seek to provide wide-area service. In this regard, we have decided that some form of wide-area licensing based on MTAs should be implemented for 800 MHz SMR service. Based on the variety of comments addressed to 800 MHz service in this proceeding, however, we believe that further comment should be solicited on certain issues relating to 800 MHz licensing before we adopt final rules. We therefore address in turn our conclusions reached in this proceeding regarding 800 MHz service and those issues on which we intend to seek further comment.

(i) *Conclusions*

(A) Rationale for Wide-Area Licensing

95. The record provides strong support for a more flexible licensing scheme than is currently in use in order for SMR to compete effectively with cellular and PCS. Our licensing rules for PCS and cellular are based on the following elements: (1) large Commission-defined service areas, (2) assignment of contiguous spectrum blocks to a single licensee on an exclusive basis, (3) use of construction and coverage requirements rather than loading requirements to ensure efficient use of the spectrum, and (4) technical and operational rules that afford maximum flexibility to locate, design, construct, and modify facilities within one's licensing area, so long as no interference is caused to other licensees.

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[191] Eden Comments at 3.

[192] Ericsson Comments at 3-4.

[193] NABER Comments at 11.

96. None of these elements is currently present in our SMR rules. SMR licensees seeking to construct wide-area systems must obtain authorizations on a station-by-station basis, do not necessarily receive contiguous channels, are subject to loading requirements, and must apply to the Commission for permission to make even relatively minor modifications to their systems. Thus, while we have authorized the development of wide-area SMR systems under these rules, SMR applicants must overcome many more regulatory obstacles than PCS and cellular providers in order to obtain such authorizations and construct their systems.[194] In addition, the patchwork nature of past licensing in the 800 MHz band means that SMR licensees who have obtained wide-area authorizations will not necessarily be able to operate on a contiguous block of spectrum throughout a defined service area.

97. In the *800 MHz EMSP Notice*, we proposed to address the obstacles facing wide-area SMR systems by means of a wide-area licensing scheme that would allow licensees to acquire an identified block of channels within an MTA under a single authorization to the extent such channels were available.[195] Based on the record of our *800 MHz EMSP* docket and additional comments received in response to the *Further Notice*, we conclude that implementing wide area licensing on this basis would promote competition between SMR licensees and other wide-area CMRS providers. Assigning channel blocks in Commission-defined service areas eliminates the need for many of the complicated and burdensome licensing procedures that have hampered SMR development in the past. This approach also furthers the Congressional goal of ensuring comparable regulation for substantially similar services, because 800 MHz SMR providers compete or have the potential to compete with other CMRS providers who are licensed in Commission-defined areas. Accordingly, we conclude that wide-area licenses should be used in the 800 MHz band, authorizing the licensee to construct stations anywhere in its specified service area on any authorized channels that are available for construction. Subject to certain conditions specified below, the wide-area licenses will also enable the licensee to "self-coordinate" system modifications within its service areas, such as additional stations or changes to existing stations, without the

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[194] Currently, wide-area SMR systems are licensed pursuant to Section 90.631(c), which requires applicants seeking additional trunked channels to demonstrate that they have achieved a loading level of 70 mobiles per channel on their existing channels. Under the criteria set forth in our *Fleet Call* decision and a 1993 Private Radio Bureau letter, wide-area applicants may meet this loading requirement by a showing of "aggregate loading" of their existing licensed channels, thereby acquiring additional channels that would ordinarily not be available through a strict interpretation of our "40 mile rule" and our rule that limits applicants to obtaining five channels at one time. *See* Request of Fleet Call, Inc., for Waiver and Other Relief To Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, File No. LMK-90036, Memorandum Opinion and Order, 6 FCC Rcd 1533 (1991); Letter from R. Haller, Chief, Private Radio Bureau, FCC, to D. Weisman, DA 92-1734, 8 FCC Rcd 143 (1993). In addition, applicants seeking an extended construction period to construct wide-area systems must make an affirmative showing under our extended implementation rules. *See* 47 CFR § 90.629.

[195] *800 MHz EMSP Notice*, 8 FCC Rcd at 3954-57 (paras. 20-32).

need for prior Commission approval. This simplified approach toward licensing will enable MTA licensees to implement their systems in the least burdensome manner possible.

(B) Service Area

98. In the *800 MHz EMSP Notice*, we proposed to use either Major Trading Areas (MTAs) or Basic Trading Areas (BTAs) as the basis for wide-area licensing.[196] In the *Further Notice*, we sought comment on whether Commission-defined service areas continued to be viable in light of the high level of occupancy and ongoing licensing of 800 MHz SMR frequencies or whether licensee-defined areas should be used. Upon review of the comments in both proceedings, we believe the weight of the record supports adoption of MTA-based service areas.[197] Although some commenters support the view that licensee-defined service areas should be used because of the limits on available channels, we conclude that standard Commission-defined areas are simpler to administer, will provide licensees and the public with greater certainty about what area is covered by each authorization, and will make it easier to resolve conflicts between applicants seeking to provide service to a common area.

99. We also conclude that the use of MTA-based service areas, identical to those we adopted for PCS, for wide-area licensing of 800 MHz SMR is preferable to using BTAs or other, smaller Commission-defined areas.[198] We agree with the view expressed by Nextel that an MTA-defined service area is "large enough that it allows for economies of scale, represents the natural commercial markets within the United States, facilitates roaming, [and]

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[196] *Id.* at 3953 (para. 15). Rand McNally organizes the 50 states and the District of Columbia into 47 MTAs and 487 BTAs. *See* Rand McNally, Inc., COMMERCIAL ATLAS AND MARKETING GUIDE 38-39 (1992).

[197] We note that Rand McNally & Company is the copyright owner of the MTA/BTA Listings, which list the BTAs contained in each MTA an the counties within each BTA, as embodied in Rand McNally's Trading Area System MTA/BTA Diskette, and geographically represented in the map contained in Rand McNally's *Commercial Atlas & Marketing Guide.* The conditional use of Rand McNally's copyrighted material by interested persons is authorized under a blanket license agreement dated February 10, 1994. This agreement covers the 800 MHz SMR service and requires authorized users of the material to include a legend on reproductions (as specified in the license agreement) indicating Rand McNally's ownership. *See* Amendment of the Commission's Rules To Establish New Personal Communications Services, GEN Docket No. 90-314, Memorandum Opinion and Order, FCC 94-144, released June 13, 1994, at para. 24 nn. 23 & 24 (*Broadband PCS Reconsideration Order*).

[198] In addition to the 47 Rand McNally MTAs, we establish three licensing regions to cover United States territories as follows: Guam and the Northern Mariana Islands will be licensed as a single area, Puerto Rico and the U.S. Virgin Islands as a single area, and American Samoa as a single area. We will also license Alaska as a single area separate from the Seattle MTA. This is consistent with our MTA-based service area definitions for broadband PCS. *See* 47 CFR § 24.102.

reduces the need for interference coordination . . . .''[199] Allowing licensees to operate over MTAs as opposed to smaller areas will enhance their ability to invest in technology and to re-use their channels more effectively. In addition, many of the authorizations already granted to SMR licensees for wide-area systems are for MTA-sized areas or for regions larger than a single MTA. Thus, MTAs appear to be the most suitable ''building blocks'' for SMR licensees who seek to construct wide-area systems. Finally, MTA licensing is likely to be more practical if we decide that, as discussed below, wide-area licensees should be required to afford protection to incumbent co-channel licensees within their service areas. Because the number of incumbent licensees may be significant in many markets, we believe that using smaller service areas than MTAs could cause many of these licenses to have little practical utility or value.

(ii) *Further Notice Issues*

100. While we conclude that the record provides substantial evidence to support our conclusion that 800 MHz SMR systems should be licensed on an MTA basis, the comments raise many questions regarding which channels should be subject to wide-area licensing and how incumbent systems on such channels should be treated. Specifically, many of these comments focus on Nextel's proposal to designate the upper 200 SMR channels in the 800 MHz band for MTA-based licensing and to require non-MTA licensees on these channels to move to other frequencies. Given the importance of these issues to the SMR industry, we believe the best course is to seek further comment on them in our *800 MHz EMSP* docket, and we will therefore shortly be issuing a further notice of proposed rule making to that effect. We believe, however, that the existing record supports certain tentative conclusions regarding these issues. Accordingly, we briefly summarize these preliminary views here, although we emphasize that interested parties will have the opportunity to address these issues further in the upcoming rule making.[200]

(A) Channel Blocks

101. Most commenters agree that for wide-area SMR systems to compete in the CMRS market, they must have the ability to use (and reuse) a large number of channels, preferably on contiguous frequencies. In the *800 MHz EMSP Notice*, we proposed to allow wide-area licensees to acquire up to 42 unconstructed channels at a time in an MTA. This number reflected the minimum number of channels needed to construct a system based on MIRS technology, commonly used by SMR systems, with the capacity to employ frequency reuse. In the *Further Notice*, we sought comment on this and other alternatives for the number of SMR channels to be licensed on a wide-area basis.

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[199] Nextel Comments at 15.

[200] To the extent not addressed in this Order, specific additional technical and operational rules for MTA-based SMR licensees at 800 MHz will be adopted in our final Report and Order in the 800 MHz EMSP proceeding, PR Docket No. 93-144.

102. In response to the *Further Notice*, Nextel proposes that we set aside 200 channels for use by a single wide-area licensee. Nextel notes that this allocation, which would total 10 MHz of spectrum, is less than half the amount of spectrum available to cellular and some broadband PCS licensees, and argues that it is the minimum allocation necessary for an SMR licensee to compete with these other services. Nextel also argues that obtaining contiguous spectrum is essential to the competitive viability of wide-area SMR because it enables systems to use spread spectrum and other broadband technologies that are available to cellular and PCS but unavailable to systems operating on non-contiguous channels. Nextel therefore proposes that we distinguish the "upper block" of 200 contiguous SMR channels in the 800 MHz band from the 80 lower SMR channels, which are divided into 8 non-contiguous blocks with other private land mobile services (*e.g.*, Public Safety, Industrial/Land Transportation) assigned to the intervening channels.

103. We agree with Nextel's view that assigning contiguous spectrum, where feasible, is likely to enhance the competitive potential of wide-area SMR providers. For this reason, we believe that Nextel's proposal to distinguish the "upper block" of 200 channels from the "lower" 80 channels for purposes of wide-area licensing has merit. We are not convinced, however, that automatically assigning all 200 channels to a single SMR provider is justified. Numerous commenters contend in response to Nextel's proposal that viable wide-area systems could be based on smaller numbers of channels. Although such systems might not be capable of providing the full array of services offered by a cellular or 30 MHz PCS licensee, these commenters argue, they would be capable of providing specific services on a competitive basis.

104. Because Nextel's proposal to create a 200-channel block for wide-area licensing was not part of our *Further Notice*, we will seek further comment on (1) the number of 800 MHz SMR channels to be licensed on an MTA basis, (2) the number of channels that would be included in a single MTA license block, and (3) whether limits should be placed on the aggregation of channel blocks by a single licensee within an MTA. Based on the record in this proceeding thus far, we believe that the "upper 200" channels should be designated for wide-area licensing on an MTA basis, as Nextel proposes, but that this spectrum should be divided into four blocks of 50 channels. These blocks approximate the 42-channel threshold for frequency reuse identified in the *800 MHz EMSP Notice*, and would allow for the possibility of licensing more than one wide-area provider in each MTA. We would also allow wide-area applicants to bid for any or all of the 50-channel blocks in an MTA, so that the marketplace can determine whether these blocks are most valuable separately or aggregated together.

105. We will also seek comment on continuing to license the "lower" 80 SMR channels on a station-by-station basis. This would ensure that 4 MHz of spectrum continue to be available for licensees who do not seek to construct MTA-wide systems. As discussed in Section III.C.2.b, *infra*, even if we retain station-by-station licensing on these channels, we are eliminating loading requirements and the "40-mile" rule for all 800 MHz SMR licensees. We will, however, limit the number of channels that a licensee may obtain at one

time in an area without having constructed and commenced operations on all previously authorized channels.[201] In addition, because we intend to adopt extended construction timetables for MTA-licensed systems on the 200 upper channels, we would no longer entertain requests for extended construction authority to establish wide-area systems on the lower 80 channels.[202]

(B) Treatment of Incumbent Systems

106. We recognize that the large number of systems already authorized or operating in the band places significant limitations on our ability to provide MTA licensees with clear spectrum comparable to our allocations for cellular or PCS. We also believe that the interests of potential MTA licensees must be balanced against the interests of existing licensees who do not seek to operate on an MTA-wide basis. In our *800 MHz EMSP* proposal, we proposed that incumbent licensees be allowed to continue operating under their existing authorizations and that EMSP licensees provide co-channel protection to all such systems constructed and operating within their service areas. Under the approach advocated by Nextel, incumbent systems operating in the "MTA block" would be required to move to lower SMR frequencies, albeit at the MTA licensee's expense, in order to clear the upper band for wide-area use. Based on the record in the *800 MHz EMSP* docket and the numerous comments regarding the Nextel proposal, our current assessment is that incumbent SMR systems should not be subject to mandatory relocation to new frequencies and should be entitled to co-channel protection by MTA licensees. Nevertheless, we will seek further comment on Nextel's proposal and on possible alternative mechanisms for encouraging relocation by incumbents.

(iii) *Procedural Issues*

107. Our decision to implement a wide-area licensing mechanism for 800 MHz SMR and to seek further comment on the issues described above requires us to address briefly several procedural issues. First, as discussed in greater detail in Section III.E.6.d, *infra*, we have decided to use competitive bidding to resolve mutually exclusive applications for 800 MHz licenses. Accordingly, we will not limit eligibility for MTA licenses to existing 800 MHz licensees who are constructing wide-area systems, as Nextel and some other commenters have proposed, but will allow both existing licensees and new entrants to apply on an equal basis without restrictions on eligibility.

108. In addition, because of the fundamental changes we are proposing in the service areas and channel blocks for future licensees in this service, we are suspending the

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[201] *See* paras. 192-193, *infra*.

[202] *See* para. 181, *infra*. Under this proposal, we would not restrict SMR licensees from using these channels as part of a larger wide-area system. We would require, however, that all stations authorized on such channels be constructed within 12 months.

acceptance of 800 MHz applications on the 280 SMR category channels on the close of business on August 9, 1994, the adoption date of this Order.[203] We will consider requests for waiver of the application freeze for new station licenses for permanent facilities, provided that operation of such proposed stations affects coverage solely within a geographic area and on a frequency channel that already is licensed permanently to the applicant(s), *i.e.*, there is no infringement of new spectrum or previously uncovered geographical areas .[204] The waiver applicant bears the burden of demonstrating compliance with these requirements. We will also continue to accept new SMR applications for General Category channels.[205] Although it was stated at the time of adoption of this Order that acceptance of these applications would also be frozen,[206] we conclude on reconsideration on our own motion[207] that it is not practically possible to freeze SMR applications for these channels while continuing to accept and process non-SMR applications for the same channels and that such a freeze is unwarranted given that we do not propose to use these additional channels for MTA licensing.

(2) *900 MHz SMR*

(a) Background and Pleadings

109. In the *Further Notice*, we asked comment on whether we should proceed with wide-area licensing in the 900 MHz SMR service based on a proposal originally made in our *900 MHz Phase II* proceeding.[208] In this regard, we observed that unlike the 800 MHz SMR band, the 900 MHz SMR band is lightly occupied. This is due to the fact that we have licensed the twenty 10-channel 900 MHz spectrum blocks only within the immediate vicinity

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[203] Applications for transfer or assignment of existing SMR facilities will continue to be accepted.

[204] This may be the case, for example, when filing for authority within a service area in which an existing facility is "deconstructed" and new facilities are constructed to cover the same coverage area for the purpose of increasing service capacity.

[205] *See* 47 CFR §§ 90.615, 90.621(g).

[206] "Regulatory Framework for CMRS Completed," Rpt. No. DC-2638, at 3, Aug. 9, 1994 (FCC news release).

[207] *See* 47 CFR § 1.108.

[208] *Further Notice*, 9 FCC Rcd at 2871 (para. 34). *See* Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, First Report and Order and Further Notice of Proposed Rule Making, 8 FCC Rcd 1469 (1993) (*900 MHz Phase II Notice*).

of the top 50 markets in the country.[209] Furthermore, since licensing began in 1987, we have cancelled a significant percentage of these licenses for failure to construct, so that some channel blocks are available in the majority of these markets as well.

110. Based on these factors, we tentatively concluded in the *Further Notice* that licensing on 900 MHz could readily proceed on an MTA, BTA, and nationwide basis. While acknowledging that the channel blocks available to 900 MHz licensees would afford them less spectrum than is available to 800 MHz SMR, cellular, or broadband PCS licensees, we sought comment on our conclusion that allocating the 900 MHz spectrum in this manner would allow licensees to create viable regional and nationwide CMRS systems.[210]

111. Most commenters support the concept of wide-area licensing for 900 MHz SMR based on MTA service areas. RMD states that such licensing should be the "norm" for 900 MHz SMR because this will give licensees the same flexibility for construction and operation of transmitters afforded to cellular.[211] NABER, AMTA, Geotek, and RAM Tech concur that we should adopt MTA-based licensing, with Geotek arguing that BTAs would be too small a region and AMTA asserting that nationwide licensing is not viable because most of the available channel blocks in major markets are already licensed.[212] Only Southwestern Bell opposes MTA, BTA, or nationwide licensing for 900 MHz SMR, arguing that such a licensing scheme would give 900 MHz SMR an "advantage over cellular."[213]

112. Commenters expressed differing opinions on whether initial eligibility for wide-area licensing at 900 MHz should be limited to incumbent licensees, as we originally proposed in *900 MHz Phase II*. RAM Tech, for example, argues that existing licensees who

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[209] We allocated 200 channel pairs (12.5 kHz per channel) in the 900 MHz band for the SMR service in 1986 and established a two-phase process for licensing these channels. *See* Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, GEN Docket No. 84-1231, Amendment of Parts 2, 15, and 90 of the Commission's Rules and Regulations To Allocate Frequencies in the 900 MHz Reserve Band for Private Land Mobile Use, GEN Docket No. 84-1233, Amendment of Parts 2, 22, and 25 of the Commission's Rules To Allocate Spectrum for, and To Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, GEN Docket No. 84-1234, Report and Order, 2 FCC Rcd 1825 (1986). Phase I licensing began in 1987 and was completed in 1992 within the 46 "Designated Filing Areas" (DFAs) representing the top 50 markets in the Nation. Twenty licenses were authorized within each DFA.

[210] *Further Notice*, 9 FCC Rcd at 2871 (para. 34).

[211] *See* RMD Comments at 6. *See also* APACG Comments at 8-9 (recommending wide-area market licensing for 900 MHz paging).

[212] Geotek Comments at 9-10; AMTA Comments at 17-18.

[213] Southwestern Bell Comments at 9-10.

have invested in the ''fragmentary'' markets licensed to date should be able to expand their systems to MTA borders without being subject to competing applications. Similarly, Geotek and AMTA propose that we allow existing licensees to add base stations to their existing systems as ''modifications'' that would not be subject to competitive bidding.[214] APACG, on the other hand, opposes permitting existing licensees to expand their service areas while potential new entrants are barred from applying.[215]

(b) Discussion

113. Based on our view of actual and potential competition in the CMRS market, we conclude that our channel assignment and service area rules for 900 MHz SMR service, like those for 800 MHz, should be comparable to those of cellular and PCS to the extent practical. Although only 5 MHz of spectrum is available in the 900 MHz band, we believe that this service presents significant opportunities for the development of certain types of wide-area mobile voice and data services that could compete with these other services. In addition, the limited amount of prior licensing at 900 MHz makes implementation of wide-area licensing considerably simpler than at 800 MHz, where extensive licensing has already occurred. Therefore, we believe it is appropriate to adopt a final decision with respect to wide-area licensing at 900 MHz. We state our general conclusions in this Order, and will issue specific technical and operational rules for 900 MHz wide-area service in a final Report and Order in the *900 MHz Phase II* proceeding[216]

(i) *Service Area*

114. In the *900 MHz Phase II Notice*, we proposed to use a combination of nationwide, regional, and local service areas for the ''Phase II'' roll-out of 900 MHz service.[217] In the *Further Notice*, we sought further comment on MTA, BTA, and nationwide service areas for 900 MHz licensees in light of the Budget Act's objective of ensuring comparable regulation of substantially similar services. Based on the comments received in

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[214] Geotek Comments at 11-12; AMTA Comments at 17.

[215] APACG Comments at 7-8.

[216] Final implementation of wide-area licensing for 900 MHz SMR service requires us to address numerous technical and operational details. (*e.g.*, co-channel interference standards, height and power limitations) that are not essential to the underlying conclusions reached in this Order and that we do not intend to address at this time. Rather than issue skeletal and incomplete rules for 900 MHz SMR service at this point, therefore, we will issue comprehensive final rules in conjunction with our final *900 MHz Phase II* order resolving all outstanding technical and operational issues that remain.

[217] Our primary proposal was to use nationwide licensing for three 20-channel blocks, regional licensing based on the seven Regional Bell Operating Company (RBOC) regions for six 20-channel blocks, and local licensing for the remaining 20 channels. *900 MHz Phase II Notice*, 8 FCC Rcd at 1472-73 (para. 14).

both proceedings, we conclude that we should modify our proposed *Phase II* approach and use MTAs as the service area for future 900 MHz SMR licensing.[218] First, we conclude that the limited success of existing 900 MHz systems confined to providing service in DFAs argues against the use of more numerous BTAs or similarly small service areas, which are not substantially larger (and are in some cases smaller) than DFAs in most major markets. We agree with the view of many commenters that MTA licensing is more likely to create opportunities for both existing licensees and new entrants to meet customer demands for wide-area service.

115. We also conclude that using MTAs is preferable to using larger regional service areas or licensing on a nationwide basis, because use of these larger service areas could unnecessarily restrict entry into the 900 MHz market to a very small number of licensees. We find that use of MTAs for licensing of 900 MHz services will promote greater opportunities for entry without foreclosing the possibility of geographic consolidation, subject to Commission review and approval.

(ii) *Channel Blocks*

116. The 900 MHz SMR band is comprised of 20 blocks of 10 contiguous channels each, interleaved with channels assigned to other Part 90 services. In the *900 MHz Phase II Notice*, we proposed to license these channels in 20-channel groups (*i.e.*, combining two 10-channel blocks), with no applicant allowed to acquire more than 40 channels in a given service area.[219] We conclude that in light of the flexibility conferred by our ability to use auctions, each 10-channel block should be separately licensed and that applicants should be permitted to aggregate blocks if they so desire. We also no longer believe it is necessary to limit licensees to 40 channels in a service area. In our *Phase II* proposal, which preceded the Budget Act, we assumed that we would not be able to select wide-area licensees by auction and that initial eligibility for each channel block would be limited to incumbent DFA licensees with a substantial presence in the relevant service area. As discussed below, we now intend to use auctions to select 900 MHz licensees[220] and will therefore not restrict eligibility for any channel block. Because we are not restricting eligibility, we believe it is appropriate to allow both incumbents and new entrants to bid without restriction for one or more 900 MHz blocks.

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[218] As discussed in note 197, *supra*, Rand McNally has licensed the use of its copyrighted MTA/BTA Listings and maps for certain services such as PCS and 800 MHz SMR. At present, however, 900 MHz SMR service is not covered by this agreement. We encourage interested parties and Rand McNally to explore the extension of the current agreement to cover 900 MHz SMR service as well.

[219] *900 MHz Phase II Notice*, 8 FCC Rcd at 1472-73 (paras. 13-14).

[220] Specific auction rules and procedures for 900 MHz SMR licensing will be addressed in a subsequent order in our competitive bidding proceeding.

(iii) *Scope of Wide-Area Authorizations*

117. Consistent with the flexibility granted to cellular and PCS licensees, MTA licensees on 900 MHz channels will be authorized to construct stations anywhere in their MTAs on authorized channels that are available for construction. The MTA license will allow a licensee to expand or modify facilities throughout its service area without further Commission action, so long as the system continues to be in compliance with our technical and operational rules.

(iv) *Treatment of Incumbent Systems*

118. We conclude that incumbent systems are entitled to full co-channel interference protection for existing facilities, but are not allowed to expand beyond existing service areas unless they obtain the MTA license for the relevant channels. Even if we were to decide that mandatory relocation of incumbents was appropriate for 800 MHz SMR licensees, we conclude that it is not feasible in the 900 MHz band because no alternative 900 MHz SMR channels are available for relocation. Of course, MTA licensees may negotiate mergers, buyouts, frequency swaps, or similar arrangements with incumbent systems on a voluntary basis.

119. In a few instances, incumbent 900 MHz licensees have been granted authorizations to construct facilities outside of their DFAs in order to link their facilities in different markets. We will require MTA licensees to afford protection to all such sites licensed prior to August 10, 1994. Although these authorizations were originally granted on a secondary basis, we conclude that it would be unduly disruptive to existing 900 MHz operations to require incumbent licensees to discontinue operation at these sites. We note, however, that we will not allow additional secondary site authorizations in this band.

(3) *Paging*

(a) Background and Pleadings

120. In the *Further Notice*, we observed that our rules for assigning common carrier and private carrier paging frequencies in the 900 MHz band are somewhat similar, while the rules for lower-band paging frequencies differ in that common carrier frequencies are assigned on an exclusive basis while private paging frequencies are assigned on a shared basis. We asked whether any additional rule modifications were appropriate to further conform the paging rules for the private and common carrier services. In addition, we requested comment on whether we should use Commission-defined areas for licensing paging channels instead of defining service area on a station-by-station basis as we do currently.

121. Four commenters expressed views on this issue. PCIA favors granting local, regional and nationwide exclusivity for common carrier paging systems along the lines

adopted for 900 MHz PCPs in the *900 MHz PCP Exclusivity Order*.[221] PageNet suggests adopting market area licensing for all 929-930 MHz and 931-932 MHz paging systems, with the 929-930 MHz systems based on state boundaries and 931-932 MHz systems based on MTAs. PageNet contends that this will increase opportunities for channel aggregation across all 900 MHz frequencies in common service areas, thereby "enabling providers to develop a common, multiple frequency infrastructure."[222] NABER also supports the use of MTA/BTA licensing for Part 22 paging services, but would not convert PCP licensing to MTAs or BTAs at this time because of the ongoing nature of implementing exclusivity under the *900 MHz PCP Exclusivity Order*. Finally, APACG believes that because changes to our paging rules are already at issue in the *Part 22 Rewrite* docket and the pending reconsideration of the *900 MHz PCP Exclusivity Order*, additional changes should not be made at this time in this docket.[223]

(b) Discussion

122. We concur with the assessment made by APACG that this is not the appropriate time to further modify the rules governing service areas and channel assignment in the common carrier and private carrier paging services. In our *Part 22 Rewrite Order*, we concluded that the concept of market-based service areas for 931-932 MHz paging has merit but that the issue requires further study and comment.[224] In the 929-930 MHz band, we are now implementing the exclusive licensing scheme adopted in the *900 MHz PCP Exclusivity Order*, which allows applicants to earn exclusivity for their systems on a local, regional, or nationwide basis, depending on system size and configuration. We will therefore defer further action in this area for the time being. We intend to examine our paging rules in a future proceeding, however, to determine whether further conforming of our rules is feasible.

(4) *220 MHz Service*

(a) Background and Pleadings

123. In the *Further Notice*, we sought comment on whether and to what extent we should revise our channel assignment and service area rules for the 220 MHz service to achieve comparability between this service and other competitive CMRS services. In this context, we incorporated into our proceeding a Request for Declaratory Ruling filed by

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[221] PCIA Comments at 11. PCIA plans to file a formal petition with the Commission outlining such a proposal.

[222] PageNet Comments at 15.

[223] APACG Comments at 8.

[224] *Part 22 Rewrite Order*, at para. 11.

SunCom, which seeks Commission approval of a plan to aggregate non-nationwide 220 MHz five-channel blocks on a regional basis to provide multiple-market service on a single system.[225] We invited comment on whether the statutory goals at issue in this proceeding would be furthered by permitting regional 220 MHz licensing.

124. Some commenters support the concept of regional licensing in the 220 MHz service. For example, NABER suggests that BTA or MTA licensing could be implemented without having an impact on existing licensees.[226] Simrom believes that if the Commission determines that 220 MHz service is substantially similar to narrowband PCS, it should "move expeditiously to adopt a PCS-like, area-based licensing system."[227] AMTA proposes a regional licensing scheme whereby licensees would be entitled to aggregate up to eight 5-channel blocks on multi-market basis provided that they committed to construction of at least 40 sites and made the same type of financial showing as is currently required of nationwide 220 MHz applicants.[228]

125. Commenters have diverse views with respect to SunCom's declaratory ruling petition to allow local 220 MHz licensees to aggregate channels and combine service areas to create a regional or nationwide network. USM supports SunCom's view that 5-channel stand-alone systems at 220 MHz are not economically viable, and asserts that "the only potential for successful utilization of a five-channel commercial narrowband license is as part of a multi-site system offering full market coverage and a depth of channel capacity."[229] SmartLink, however, contends that it is premature to conclude that local 5-channel systems are not viable, although it does not object to implementing SunCom's proposal in the future after the 220 MHz market has had a chance to develop.[230] Global and SEA argue that

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[225] *See Further Notice*, 9 FCC Rcd at 2872 (para. 38). SunCom's Request for Declaratory Ruling deals with Section 90.739 of the Commission's Rules, which provides that no 220 MHz licensee may be authorized to operate multiple stations in the same service category (*e.g.*, 5-channel non-nationwide) within 40 miles of the operations of another 220 MHz operator "unless that licensee can demonstrate that the additional system is justified on the basis of its communications requirements." SunCom also filed a request for waiver of the eight-month construction period for non-nationwide 220 MHz systems, proposing an eight-year period for the construction of its system. In its comments in this proceeding, SunCom revised its waiver request to reduce its construction schedule from eight to five years. SunCom Comments at 3.

[226] NABER Comments at 24-25.

[227] Simrom Comments at 8.

[228] AMTA Comments at 25-27.

[229] USM Comments at 4-5.

[230] SmartLink Comments at 6-7.

SunCom is seeking to establish a nationwide 220 MHz system outside the Commission's procedures for doing so.[231]

(2) *Discussion*

126. In adopting the rules for 220-222 MHz service in 1991, we stated that service was intended for two-way narrowband usage "to provide an incentive for users to develop narrowband technology to facilitate efficient channelization."[232] To encourage this technology to develop, we allocated 220-222 MHz spectrum for local licensing, using both trunked and non-trunked operations, and allowed trunked systems to acquire up to five channels at a single station location. In examining the rules governing channel assignments and service areas for 220-222 MHz service in light of the statutory goals of this proceeding, we conclude that there is no need to modify or conform these rules to rules applicable to other CMRS services.

127. While we have identified 220 MHz service as potentially competitive with and therefore substantially similar to other CMRS services for purposes of establishing comparable technical and operational rules, the service is still in its infancy and its competitive potential largely unknown.[233] Based on these findings, we conclude that no change to our 220 MHz rules is required in this proceeding to ensure regulatory symmetry. We also believe that a more comprehensive record is needed before we consider implementing a new licensing scheme based on different sized channel blocks or service areas. We therefore intend to initiate a separate proceeding in the near future to address these issues in the 220 MHz service.[234]

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[231] Global Comments at 7; SEA Comments at 11.

[232] Amendment of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Services, PR Docket No. 89-552, Report and Order, 6 FCC Rcd 2356 (para. 9) (1991)(*220 MHz Order*), *recon.*, 7 FCC Rcd 4484 (1992).

[233] We began receiving applications for 220-222 MHz licenses on May 1, 1991, and stopped accepting such applications on May 25, 1991. *See* Acceptance of 220-222 MHz Private Land Mobile Applications, Order, 6 FCC Rcd 3333 (Priv.Rad.Bur. 1991) (terminating acceptance of 220-222 MHz applications). In June 1992, certain aspects of our 220 MHz application procedures were appealed to the United States Court of Appeals, causing us to condition all local 220 MHz license grants on the outcome of the appeal. The appeal was dismissed in March 1994, at which time we granted an extension until December 2, 1994 for construction of all previously granted non-nationwide 220 MHz authorizations. *See* Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, PR Docket No. 89-552, Order, 9 FCC Rcd 1739 (Priv.Rad.Bur. 1994).

[234] As discussed in para. 184, *infra*, however, we are taking limited action in this proceeding to modify the current December 2, 1994, construction deadline.

128. Because we have incorporated the SunCom declaratory ruling petition into this proceeding, however, we will address some of the issues raised in the petition and responding comments. Unlike SunCom and certain other commenters, we believe it is premature to assume that 5-channel stand-alone 220 MHz service is not viable at the local level. To the contrary, we believe that the potential exists for local systems to prosper by using spectrum efficient narrowband technologies and offering a competitively priced alternative for mobile customers who do not require more costly services offered by other CMRS providers. We agree with SunCom, however, that there is potential benefit in allowing local 220 MHz licensees to aggregate more than five channels in a given market in order to meet the particular mobile communications needs of that market.

129. We note that our existing rules already provide 220 MHz licensees with flexibility to establish multi-market regional systems in this service where demand exists. Section 90.739 of our rules states that no local 220 MHz licensee will be licensed for more than one 220-222 MHz system in a given category (*i.e.*, trunked or conventional) within 40 miles of another system authorized to that licensee in the same category. Thus, this rule ordinarily limits an individual trunked system licensee to operating "stand-alone" 5-channel systems at least 40 miles apart. The rule does permit additional channels to be licensed within the 40-mile limit, however, if the licensee can "demonstrate that the additional system is justified on the basis of communications needs." In the *220 MHz Order*, we indicated that such a showing should normally be supported by documentation of the need for additional channel capacity and/or an expanded service area, based on customer demand or other technological or economic factors.[235] We also noted that any applicant seeking to invoke this exception *prior* to the construction of an initial system in the relevant area would face a heavy burden of proof.[236] We believe this continues to be an appropriate standard for requests for exemption from the 40-mile limit under Section 90.739. We therefore will generally not allow aggregation of channels by 220 MHz licensees who have not completed initial construction of their facilities, but will permit licensees who have already constructed and commenced operations to aggregate channels based on an appropriate showing under Section 90.739. Because SunCom seeks to aggregate channels assigned to licensees who have not yet completed construction, we deny its request for declaratory ruling. We also conclude that SunCom has not demonstrated the existence of extraordinary circumstances that would justify grant of an extended construction period to licensees who agree to become part of SunCom's network. Accordingly, SunCom's request for waiver of our construction rules is also denied.

b. Co-Channel Interference Protection

(1) *Background and Pleadings*

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[235] *220 MHz Order*, 6 FCC Rcd at 2364, 2375 (para. 59 n.126).

[236] *Id.* at 2364 (para. 59).

130. For most mobile services in which we assign channels exclusively to one licensee in each area, our rules contain technical assignment criteria intended to minimize the likelihood of interference between the co-channel facilities of different licensees. Although applicants are generally required to demonstrate in their applications that a proposed facility would meet these co-channel technical criteria, we also routinely authorize facilities that do not meet the criteria, provided that the applicant has obtained the consent of all other affected applicants and licensees.[237] In some mobile services *e.g.*, the Public Land Mobile Service, 800/900 MHz SMR and local 220-222 MHz service, the area in which a licensee is entitled to exclusive use of its assigned channel is determined by the locations of its individual base stations.

131. The technical co-channel interference criteria for these services typically involve minimum desired-to-undesired field strength ratios, prohibition on the overlap of service and interfering contours, or geographical separation requirements, all of which are used to determine the minimum allowable distance between co-channel base stations of different licensees. In the cellular service and in PCS, each licensee is entitled to exclusive use of its assigned spectrum within a Commission-defined licensing area (*e.g.*, MSAs, RSAs, MTAs, BTAs).[238] Under these circumstances, rules designed to limit co-channel interference to other licensees need apply only to transmitter sites near the licensing area boundaries. For stations that we exclusively assign a channel nationwide (*e.g.*, 931 MHz nationwide network paging), co-channel interference rules are necessary only at international borders.

132. In the *Further Notice*, we sought comment as to which, if any, of these existing co-channel interference criteria should be revised in order to satisfy the statutory goal of comparable technical regulations for substantially similar services. Noting that changes to these criteria, if adopted, could affect the placement of stations and selection of equipment, we sought specific comment on the potential economic impact of such changes on existing licensees. We also noted that in our previous proposals for wide-area licensing of 800 and 900 MHz SMR, we proposed to apply co-channel protection rules only to stations located near the wide area service boundaries. We sought comment on whether this approach was consistent with the goal of comparable technical regulation for substantially similar services.[239]

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[237] This consent generally takes the form of mutual agreements to "accept interference" from particular transmitter sites.

[238] In the cellular service, the original licensees in each Commission-defined licensing area on each channel block are afforded a five-year period during which they enjoy an exclusive right to their assigned spectrum throughout the licensing area. After the five-year period expires, however, these licensees and additional new licensees are entitled to exclusive use of their assigned spectrum only in an area (called the "CGSA") which is based on the area they actually serve.

[239] *Further Notice*, 9 FCC Rcd at 2872-73 (paras. 40-41).

133. Some commenters propose uniform interference criteria for services they consider to be substantially similar.[240] Pittencrieff states that there should be no difference in the co-channel interference standards imposed on cellular and wide-area SMR systems, and encourages adoption of a stricter 40/17 dBu standard for SMR systems, which Pittencrieff claims is necessary accomplish this conformance.[241] NYNEX also states that Part 90 licensees should be subject to the same co-channel technical requirements as cellular carriers.[242] APACG supports conforming the co-channel separation rules for all 900 MHz paging licensees to the maximum extent possible.[243]

134. Many other commenters express concern that in some CMRS services, imposing uniform interference criteria would cause disruption and economic harm to licensees.[244] GTE argues that although different CMRS providers may currently be subject to different rules, the burden of modifying existing facilities to comply with a uniform co-channel interference protection criteria would outweigh any concomitant benefit.[245] ITA/CICS claims that implementing significant changes to existing co-channel separation rules would cause confusion and could lead to co-channel interference that exceeds acceptable levels.[246]

135. Several commenters specifically oppose changes to our existing co-channel protection standards for SMR operations. Southern states that the Commission should maintain existing co-channel interference protection for all 800 MHz SMR licensees because millions of dollars have been invested in developing existing wide-area SMR systems, that conform with current co-channel interference rules.[247] AMTA suggests that the Commission retain existing Part 90, Subpart S co-channel separation criteria for wide-area SMR operations because these criteria will allow a gradual migration from high-power, high-antenna height operation to low-power, low-antenna height facilities and permit both kinds of

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[240] Pittencrieff Comments at 8; NYNEX Comments at 3.

[241] Pittencrieff Comments at 8.

[242] NYNEX Comments at 3.

[243] APACG Comments at 9.

[244] Southern Comments at 9 (800 MHz only); ITA/CICS Comments at 6; UTC Comments at 3; AMTA Comments at 16 (wide-area SMR only); GTE Comments at 10; Motorola Reply Comments at 7.

[245] GTE Comments at 10.

[246] ITA/CICS Comments at 6.

[247] Southern Comments at 9.

facilities.[248] UTC argues that co-channel interference criteria should not be modified for CMRS SMR operators who operate on the same channels as utilities, pipelines, and other specialized industrial users.[249]

136. Many commenters favor adoption of co-channel interference rules that limit field strength at licensing area borders but allow flexibility in the interior of the areas for which they are exclusively licensed.[250] RMD states that using this approach for most or all CMRS services would be consistent with rules applicable to cellular and PCS operations and would further the comparable regulation purposes of the Budget Act.[251] Geotek argues that licensees should have substantial flexibility to determine station power and other technical and operational parameters for facilities located within the interior of their licensing area.[252] PageNet, addressing 900 MHz paging operations, supports the use of a mathematical formula such that at a given distance from the border, a licensee could determine the maximum allowable combination of transmitter power and antenna height that would provide the required level of protection at the licensing area boundary.[253]

137. Commenters also note that there may be practical limitations to the use of service-area border standards in Part 90 services, however. PCC suggests that interference be regulated at the licensed boundary of a wide-area service, but only if the licensee has exclusive use of its channels throughout the area.[254] NABER asserts that co-channel interference criteria at the border of the service area is appropriate for service-area based licensees, but that current interference rules should be retained in those Part 90 services where transmitter-based licensing is retained.[255]

(2) *Discussion*

138. Initially, we note that the technical limits and criteria in our rules were originally developed in consideration of the state of technology and conditions under which each service

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[248] AMTA Comments at 16.

[249] UTC Comments at 3.

[250] Geotek Comments at 16; PCC Comments at 7; RMD Comments at 8; PageNet Comments at 19; NABER Comments at 12.

[251] RMD Comments at 8.

[252] Geotek Comments at 16.

[253] PageNet Comments at 19.

[254] PCC Comments at 6.

[255] NABER Comments at 25.

was expected to operate at the time it was established. From time to time, we have refined these rules to reflect technological advancement and evolution in the way the services operate. Relatively recent technological advancements include the increasing use of digital emissions and modulation techniques, and one of the more significant evolutionary trends in service operation is the expansion of local services to provide wide area operations. A second point we must bear in mind, in considering major changes to our technical rules, is that many of the various technical rules are both inter-related and inter-dependant. Therefore, we should not consider changes to these rules in isolation, but rather we should consider the potential overall effect of all changes to the technical rules.

139. We find considerable agreement in the record that the purpose of co-channel interference rules is to protect the service of each licensee's facilities from interference caused by operation of co-channel facilities of *other licensees operating in adjacent areas*, not from interference caused by the licensee's own facilities. Thus, we do not need rules to address intra-system interference problems; rather, we should allow a licensee to resolve its internal co-channel interference problems by employing the technical solutions the licensee finds appropriate. This position mainly affects rules governing services that were originally envisioned as local services provided by stand-alone stations operating in a co-channel environment of stand-alone stations operated by other licensees, but are now evolving into multi-station systems covering a wide area. We conclude that, if and when we redesign our rules and licensing processes to facilitate wide-area or market area based licensing of a service that was originally envisioned as comprising local stand-alone stations, we will at that time remove rules that govern co-channel interference on a station-by-station basis, and adopt only rules as needed to prevent unacceptable co-channel interference between licensees at the boundary of their exclusively licensed area.

140. Our main purpose here is to consider whether disparities between rules governing various CMRS services unnecessarily impair competition. After careful consideration of these rules and the record in this proceeding we conclude that, for the most part, our existing co-channel interference rules are necessary and that these existing rules do not impair competition.

141. We believe that the principal areas in which co-channel interference rules may affect competition are in the technical quality of the service provided to subscribers and in the cost of compliance. In industry surveys, voice quality (*i.e.*, intelligibility, freedom from noise) is often listed by subscribers as one of the most important factors influencing their decisions when obtaining equipment or services. In paging services, quality refers to reliable and timely delivery of transmitted messages. Co-channel interference rules, regardless of their form, are designed to ensure technical quality by requiring that the ratio of the field strength of the desired signal to that of undesired signals (C/I,[256] or in noise limited services,

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[256] Carrier-to-interference ratio.

C/N[257]) within a licensee's service
area does not drop below that considered necessary to provide satisfactory service. Where frequency modulation is used for radiotelephony (as in cellular or SMRs for example), industry experience has indicated that a minimum C/I or C/N of 18 dB is necessary.[258] Existing cellular services meet this standard in considering reliable service to be provided with a median field strength of 32 dBμV/m (18 dB above a 14 dBμV/m noise floor at 850 MHz).[259] SMR services that comply with the Subpart S 40/22 dBμV/m standard, while noise limited, also meet the 18 dB C/I criterion (40 dBμV/m - 22 dBμV/m = 18 dB). Other existing CMRS co-channel interference standards require similar or better C/I ratios. In summary, all existing co-channel interference standards provide for acceptable technical quality, and none of them allows an unacceptable level of interference that would degrade technical quality.

142. Compliance with co-channel rules does impose costs on licensees. These costs, however, are small in comparison with the overall costs of operating a communications system. Furthermore, there is no indication in the record that there is any significant difference between the cost of compliance for the different co-channel interference rules.

143. Accordingly, we have decided to retain existing co-channel protection rules for CMRS services, except for modifications that flow from our decisions to initiate wide-area licensing in certain services. As indicated *supra,* the purpose of this proceeding is to eliminate unnecessary variances in technical and operational rules that may distort competition among CMRS providers. The record does not indicate that the existing rules create such distortion; to the contrary, commenters indicate that service-specific variations in these rules merely reflect such factors as propagation characteristics, system design and available equipment, and the service area definitions and channel assignment mechanisms that are most suitable in each service. The record also shows that conforming these rules to a uniform standard would be costly and potentially disruptive without yielding any corresponding benefit.

144. We believe the guiding principle for all CMRS services should be the use of service-specific criteria that protect co-channel licensees from interference, but do not impair competition. For example, where CMRS services have been licensed on a station-by-station basis, station-based interference criteria continue to be required to protect co-channel licensees even if such services compete against licensees who operate exclusively within Commission-defined licensing areas. We also see no justification for applying interference

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[257] Carrier-to-noise ratio.

[258] Empirical studies show that 18 dB C/N or C/I provides a demodulated FM voice quality considered good or excellent 90 percent of the time. *See* W. Lee, MOBILE CELLULAR TELECOMMUNICATIONS SYSTEMS 378 (1989).

[259] *Id.* at 229-31.

criteria that would reduce the technical flexibility enjoyed by existing licensees solely in the interest of conforming such rules to those of a competing service that operates under different conditions.

145. Based on the foregoing, we conclude that we should retain our existing co-channel protection criteria for CMRS licensees, except in certain instances discussed below where other changes adopted in this Order allow for the introduction of more flexible rules. Specifically, we will continue to apply our existing co-channel protection criteria to services that are licensed on a station-by-station basis. With respect to cellular, we will maintain the current rules that apply only to transmitting locations near the boundaries of their licensed areas. We further conclude that this approach should be adopted for wide-area licensing of 800 and 900 MHz SMR operations and for any other CMRS service in which we may introduce exclusive licensing areas in the future.[260] To the extent that incumbent SMR systems in the 800 MHz and 900 MHz MTA blocks are entitled to continued co-channel protection, however, MTA licensees will also continue to be subject to station-specific interference criteria.

c. Antenna Height and Transmitter Power Limits

(1) *Background and Pleadings*

146. The Communications Act provides that the Commission has authority to limit the transmitting power of stations.[261] With regard to CMRS offerings, our current rules specify a maximum power limit for stations in each service, but allow operation at lower power levels.[262] Although the rules do not limit antenna heights, except as may be required for environmental or air navigation considerations, they generally require that stations employing a relatively high antenna height operate at reduced transmitting power.

147. The *Further Notice* sought comments on whether the statutory goal of regulatory parity requires antenna height and transmitter power limits to be amended for base stations operating in 800/900 MHz cellular and SMR services, 900 MHz Part 22 and Part 90 paging services, and Part 22 and Part 90 mobile services below 800 MHz. We stated our belief that in general, CMRS services should operate under consistent height and power limitations that encourage technical flexibility and allow licensees to serve diverse customer needs. The *Further Notice* also requested comments on power limitations for mobile and portable units

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[260] We will outline our decisions with regard to appropriate field strength limits at MTA borders for 800 and 900 MHz licensees in our final orders in the *800 MHz EMSP* and *900 MHz Phase II* dockets, respectively. *See* notes 200, 216, *supra*.

[261] Communications Act, § 303(c), 47 U.S.C. § 303(c).

[262] In the Mass Media Services, we also specify a minimum transmitting power. *See, e.g.*, 47 CFR §§ 73.211, 73.614.

operating in these services. Aside from any possible action to conform the rules relating to mobiles and portables, we stated that we would apply the 1992 IEEE/ANSI standard for radiofrequency (RF) emissions to all CMRS and PMRS mobiles, as proposed in our *RF Radiation Notice*.[263]

148. A wide range of comments were received concerning cellular and SMR height and power limits, which currently allow SMR base stations to operate at higher power than cellular base stations. In general, SMR commenters oppose reducing SMR height and power limits to conform these rules to our cellular rules. These commenters argue that reducing SMR limits is not practical because traditional SMR systems do not utilize cellular-type configurations, and that conforming SMR systems to cellular standards would entail extensive and expensive equipment modification and site reconfigurations.[264] Cellular commenters argue that cellular and SMR height and power limits should be equivalent so that cellular systems are not at a competitive disadvantage with SMR operations. Some suggest that this should be accomplished by raising cellular antenna height and power limits to SMR standards,[265] while others suggest that SMR systems be made to conform to cellular standards.[266]

149. With respect to power limits for paging services, most commenters address the issue of conforming our Part 90 and Part 22 rules for 900 MHz paging services. PageNet and NABER support allowing all 900 MHz paging stations under Part 90 to operate at a maximum power of 3500 watts ERP, as is currently allowed under Part 22.[267] In the case of Part 90 paging and Business Radio services below 800 MHz, NABER opposes modifying height and power rules to conform to Part 22 because Part 90 licensees operate on shared channels.[268]

150. Only one commenter suggests the need to change our height and power requirements for commercial 220 MHz service. Simrom argues that if we conclude that 220 MHz service is substantially similar to 150 MHz common carrier mobile service, the antenna

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[263] *Further Notice*, 9 FCC Rcd at 2874-75 (paras. 48-53). *See* Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, ET Docket No. 93-62, Notice of Proposed Rule Making, 8 FCC Rcd 2849 (1993) (*RF Radiation Notice*).

[264] NABER Comments at 26; US Sugar Comments at 12; Southern Comments at 10; Pittencrieff Comments at 9; RMR Comments at 14.

[265] McCaw Comments at 26; RAM Tech Comments at 8; PCIA Comments at 12.

[266] GTE Comments at 11; New Par Comments at 8.

[267] PageNet Comments at 22; NABER Comments at 27.

[268] NABER Comments at 27.

height limitation for the 220-222 MHz band should be increased from 150 meters to 305 meters to correspond to the Part 22 limit.[269]

151. Commenters present diverse opinions on the issue of conforming power limits for CMRS mobile and portable units. NABER opposes reducing the maximum power of SMR mobiles to conform to the more restrictive limit for cellular mobiles. NABER argues that because many SMR systems do not use a cellular configuration, their mobiles must operate at higher power in order to transmit to more distant base stations.[270] RMD asserts that to the extent that the power of mobile units is limited by ANSI/IEEE RF exposure standards and other considerations such as power consumption, output power should be limited to the amount necessary to operate systems to achieve high quality service.[271] Southwestern Bell advocates the establishment of equitable power limits for all CMRS mobiles at the time that we conclude the *RF Radiation* proceeding.[272]

(2) *Discussion*

152. Although we sought comment on the possibility of simply equalizing the maximum power limits in pairs of comparable services, our conclusion that all CMRS carriers compete in a broader market of wireless service suggests a more global analysis. Both antenna height and transmitting power affect the service range, that is, the farthest distance from the transmitter where a satisfactory signal may be received. The field strength that is considered to provide satisfactory service, however, varies between the services, and this alone renders useless any simple "comparison of the numbers" in our power and antenna height rules. For example, noise-limited cellular service is considered satisfactory at 32 dBμV/m, whereas interference-limited SMR service is protected to 40 dBμV/m. From this, one might conclude that SMR base stations need 8 dB more transmitting power merely to have the same service range as cellular base stations, assuming equal antenna heights. Traditional SMRs, however, are more likely to employ the most favorable antenna sites available, and thus are more likely to have higher antennas. Also, despite the fact that the cellular power limit is 500 watts ERP, cellular systems rarely employ this much power. Instead, cellular base stations typically operate between 100 and 200 watts ERP at about 50 meters antenna height. This gives them a range of about 22 kilometers (14 miles). SMR systems are allowed 1000 watts ERP at 305 meters (1000 feet) and are considered to have a service range of about 32 kilometers (20 miles).

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[269] Simrom Comments at 11.

[270] NABER Comments at 27.

[271] RMD Comments at 8.

[272] Southwestern Bell Comments at 11.

153. All of this raises the question of whether the goal of providing comparable technical regulation of substantially similar services requires us to tinker with the maximum power limits simply to make the numbers equal, especially since it is not clear that doing so would have any beneficial effect. We see no reason to reduce the maximum permissible transmitter power for SMR base stations to that permitted for cellular base stations. As the record indicates, many SMR systems require higher transmitter power than do cellular systems because they rely on widely spaced transmitters to provide coverage to their service areas. Reducing the maximum allowable power for such systems would merely increase the cost of providing the same level of service by requiring these licensees to construct more transmitters without any corresponding competitive benefit. Such a burden in fact could have an adverse effect on the development and growth of competition in the wireless marketplace.

154. We likewise decline to increase further the power limits currently applicable to cellular. We do not believe that these limits have placed cellular at a competitive disadvantage to SMR, as some commenters contend. In order to maximize the potential for frequency reuse, cellular systems rely on large numbers of closely spaced stations typically operating at power levels well below the upper limits prescribed by our current rules. Moreover, to the extent that SMR licensees are seeking to provide cellular-equivalent service, their systems rely on similar low power technology. Thus, raising cellular power limits is not necessary to enhance the technical efficiency or competitive potential of cellular service.

155. As we stated in the *Further Notice*, our Part 90 and Part 22 height and power rules applicable to 900 MHz paging are already highly similar. Commenters nevertheless highlight the fact that under then-current rules, all Part 22 paging licensees could operate at 3500 watts ERP under some circumstances while only nationwide licensees could do so under Part 90. We note, however, that the current height and power limits have only been recently adopted in both rule parts and could be subject to further change. Since comments in this proceeding were filed, we have amended our Part 22 rules in the *Part 22 Rewrite Order* to allow all 931 MHz paging licensees to operate stand-alone transmitters at 3500 watts.[273] The Part 90 rule allowing 929 MHz nationwide licensees to operate at 3500 watts was also adopted recently in the *900 MHz PCP Exclusivity Order*,[274] and we are now considering several petitions for reconsideration requesting that we apply the 3500 watt limit to some non-nationwide licensees as well. We therefore will defer further action on paging height and power limits until we are able to assess the results of our decisions in these other proceedings.

156. With respect to CMRS services below 800 MHz, we agree with NABER that height and power limits applicable to Part 90 services on shared channels should not be conformed to the somewhat higher maximum limits applicable to Part 22 services in the same

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[273] *See* 47 CFR § 22.535(a).

[274] 8 FCC Rcd at 8324 (paras. 18-19).

frequency ranges. Allowing licensees on shared channels to operate at increased power could increase interference for stations operating on shared channels because of the many assignments already made on the assumption of lower power. We also decline to adopt any changes at this time to the maximum power limitations for licensees operating in the 220-222 MHz service. Most importantly, the record does not indicate any competitive disparity arising from our current rules.

157. Finally, for the reasons discussed above in relation to SMR and cellular base stations, we see no reason to conform our existing power limits for CMRS mobiles and portables. Although SMR mobiles may operate at up to 100 watts while cellular mobiles are limited to 7 watts, SMR mobile units must often use higher power in order to communicate with their base stations. In addition, cellular, SMR, and other CMRS licensees seeking to provide service based on lightweight portable units such as hand-held telephones will be limited to low-power technology regardless of our rules. We will therefore retain our existing mobile power limits for all CMRS services. In addition, however, we adopt our proposal from the *Further Notice* to apply the 1992 ANSI/IEEE RF emission guidelines to all CMRS and PMRS mobiles and portables. This is consistent with our recent decision to apply this standard to all mobiles in PCS,[275] and will ensure that all mobile radio services are subject to rigorous and consistent power limitations as to RF emissions. We will implement this decision in the proceeding in which we are conducting a complete review of RF exposure guidelines, ET Docket No. 93-62.

d. Emission Masks

(1) *Background and Pleadings*

158. To protect against adjacent channel interference, most mobile radio services operate under emission mask rules that restrict transmitter emissions on the spectrum adjacent to the licensee's assigned channel. We indicated in the *Further Notice* that because specific out-of-band emission limitations are dependent on such service-related factors as authorized bandwidth, channel spacing, and the likelihood that different licensees will operate on adjacent channels, substantial changes to these rules may not be practical or necessary.[276] For example, we noted that because adjacent SMR channels may be assigned to different licensees in a given area while adjacent cellular channels are assigned to the same licensee, it is logical that SMR transmitters should be subject to tighter emission standards than cellular transmitters. We also noted that some Part 22 and Part 90 services, such as 900 MHz

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[275] Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Second Report and Order, 8 FCC Rcd 7700, 7778 (paras. 187-192) (1993) (*Broadband PCS Order*), *recon.*, Memorandum Opinion and Order, FCC 94-144, released June 13, 1994 (*Broadband PCS Reconsideration Order*), *further recon. pending.*

[276] *Further Notice*, 9 FCC Rcd at 2873 (para. 43).

paging, already operate under very similar out-of-band emission rules.[277] We therefore sought comment on whether any changes to our emission mask rules were necessary to eliminate inconsistent regulation of substantially similar services.

159. New Par states that the differences in licensing and channel allocations between SMR and cellular operations make it impractical either to tighten the emission standards for cellular or loosen them for SMRs. New Par further states that the stricter non-cellular emission mask appears necessary to protect adjacent channel operations, and that modification (tightening) of cellular rules, while potentially reducing interference within the cellular system, would be too expensive and burdensome to implement.[278] US Sugar offers similar arguments and indicates that it is impractical to compromise the standards for either service.[279] Comments were also received suggesting that when adjacent channels are authorized to a licensee for wider-bandwidth applications, that the emission mask provide for adjacent channel protection from the edge of the licensees authorized bandwidth.[280] Southern advocates maintaining existing emission masks for CMRS licensees because the specific emission limitations are dependent upon service-specific factors such as bandwidth and channel spacing.[281]

(2) *Discussion*

160. Commenters on emission mask requirements uniformly agree that current emission masks applicable to the various CMRS services should be retained. These rules must necessarily be tailored to the specific bandwidth and channel spacing characteristics of the service in question. In some instances, such as 900 MHz paging, these characteristics allow uniform emission mask standards to be applied to both Part 22 and Part 90 licensees. In the case of SMR and cellular, however, differences in the usage of adjacent channels require the application of stricter emission mask standards to SMR systems than to cellular systems. We therefore decline to modify our out-of-band emission rules for any CMRS service.

161. We agree with commenters, however, that out-of-band emission rules, like co-channel interference rules, should apply only where emissions have the potential to affect the operations of other licensees. Thus, in cellular and PCS, where a licensee has exclusive use of a block of contiguous channels, we will apply out-of-band emission rules only to the

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[277] *Id.* (para. 44).

[278] New Par Comments at 7.

[279] US Sugar Comments at 7.

[280] PCIA Comments at 14; PageNet Comments at 21.

[281] Southern Comments at 11.

extent necessary to protect operations outside of the licensee's authorized spectrum. We will also extend this approach to the channel blocks assigned to MTA-based SMR systems, except to the extent that MTA licensees will also be required to provide adjacent channel protection to "interior" channels used by incumbent licensees.

e. Modulation and Emission Requirements

(1) *Background and Pleadings*

162. In some instances, our current mobile service rules specify the particular types of emissions that may (or may not) be used by CMRS licensees. In Part 22, our rules authorize several commonly used emission types for every licensee, but require prior FCC approval of the use of other emission types. The *Further Notice* tentatively concluded that such restrictions are generally unnecessary for CMRS provided that licensees comply with applicable rules governing co-channel interference, adjacent channel interference, and similar problems. The *Further Notice* proposed to retain two types of emission restrictions, however: (1) the requirement that cellular licensees provide OST-53[282] compatible service to customers with appropriate equipment; and (2) emission restrictions applicable to CMRS licensees operating on shared channels.[283]

163. All commenters on this issue agreed that emission limitations should be eliminated in those services where licensees are assigned channels on an exclusive basis.[284] No specific comments were received on our proposal to retain existing requirements pertaining to OST-53 compatible analog cellular service or emission limitations for licensees on shared channels.

(2) *Discussion*

164. The record supports our tentative conclusion that emission limitations are unnecessary for CMRS services operating on exclusive channels because licensees in such services are subject to other applicable rules designed to guard against co-channel and adjacent channel interference. It is on this basis that we have refrained from adopting emission limitations in our new PCS rules, and we conclude that other CMRS licensees should be afforded similar technical flexibility by the elimination of rules that restrict the use of certain emission types. We will not, however, eliminate the requirement that cellular licensees provide OST-53 compatible service to customers with analog equipment. We note

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[282] Office of Engineering and Technology Bulletin No. 53 (Cellular System Mobile Station - Land Station Compatibility Specification). *See Further Notice*, 9 FCC Rcd at 2875 (para. 56 n.93).

[283] *Further Notice*, 9 FCC Rcd at 2875 (para. 55).

[284] NABER Comments at 28; CTIA Comments at 3; McCaw Comments at 28; PageNet Comments at 23; Southern Comments at 11; Pittencrieff Comments at 10.

that this rule is actually an interoperability requirement and does not restrict the ability of cellular licensees to use other emission types, but simply ensures that customers will continue to have access to OST-53 compatible cellular service. We will also retain existing emission restrictions applicable to CMRS systems operating on shared channels, which are necessary to insure that licensees do not engage in incompatible uses of shared channels.

f. Interoperability

(1) *Background and Pleadings*

165. In the *Further Notice*, we noted that cellular systems are subject to mandatory interoperability rules designed to ensure that all cellular equipment is compatible and that customers will have the ability to roam from one licensee's service area to another. We further noted, however, that these rules have been liberalized with respect to cellular and that we have not imposed similar requirements on other Part 22 services or on Part 90 services. In light of the statutory goal of establishing comparable regulatory requirements for competing CMRS services, the *Further Notice* sought comment on several options relating to interoperability: (1) establishing interoperability among all classes of CMRS equipment; (2) establishing such standards for equipment within particular classes or types of CMRS service; or (3) retaining cellular interoperability requirements but not extending such requirements to other CMRS services.[285]

166. Commenters generally oppose adopting any type of common interoperability standard for all CMRS. Some commenters contend CMRS providers will voluntarily adopt such standards if they consider them to be in the best interest of their particular service, as the paging industry has already done.[286] Other commenters assert that mandatory interoperability standards would cause mobiles and portables to be significantly costlier and bulkier because of the variety of operational modes that would be required.[287] With respect to specific services, SMR licensees generally agree that interoperability should not be required for SMR systems.[288] Geotek argues, for example, that there is no need to require interoperability at the handset level because it can be accomplished at the switching level within the public switched telephone network. Some commenters suggest, however, that the Commission should play an affirmative role in the development of CMRS interoperable

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[285] *Further Notice*, 9 FCC Rcd at 2875-76 (para. 57).

[286] New Par Comments at 9; Ericsson Comments at 2-4; BellSouth Comments at 15; APC Comments at 4; PCIA Comments at 14; PageNet Comments at 24; Motorola Reply Comments at 2, 11-12.

[287] Pittencrieff Comments at 10; Southwestern Bell Comments at 12; NABER Comments at 28; RMD Comments at 9.

[288] RMD Comments at 9; Southern Comments at 10; US Sugar Comments at 13.

technology. For example, PCC and Simrom propose that the Commission establish a 5-year deadline after which the Commission would not type accept non-interoperable 800 MHz equipment. They claim that this approach will allow amortization of existing equipment while encouraging the industry to move expeditiously to a common air interface.[289]

(2) *Discussion*

167. Based on the record, we conclude that there is no need to adopt any new interoperability standards for CMRS at this time. Although we adopted mandatory interoperability requirements at the inception of cellular service, we believe that competition in the CMRS marketplace now provides sufficient incentives for CMRS licensees to develop interoperable technology, and we strongly encourage the industry to develop such standards on a voluntary basis. We are also concerned that mandating immediate interoperability in CMRS equipment could add significantly to equipment costs and could result in standards that do not take the pace of technological innovation into account. For these reasons, we have refrained from subjecting PCS to mandatory interoperability standards,[290] and we reach the same conclusion with respect to CMRS generally.

168. Although we have concluded that there is no immediate need for the establishment of interoperability standards, we will initiate an inquiry in the near future to examine this issue in greater detail. In this proceeding we will examine the question of whether the absence of mandatory standards has an adverse effect on competition and the ability of consumers to change service providers and to roam among the license areas of different service providers.

2. *Operational Rules*

a. Construction Period and Coverage Requirements

(1) *Background and Pleadings*

169. In the *Further Notice*, we sought comment on whether to amend our rules regulating time to construct and defining minimum scope of construction for CMRS licensees. In general, we noted that our rules distinguish between CMRS systems based on geographic scope and technical complexity. Thus, licensees of mobile systems that are not unusually complex, deployed throughout wide areas, or subject to multi-year planning cycles must construct within a relatively short time period: typically 12 months for Part 22 licensees and 8 months for Part 90 licensees (other than trunked SMR systems). Licensees constructing systems that are more complex and/or that will cover large geographic areas (*e.g.*, cellular, PCS) are typically afforded multi-year construction periods combined with interim coverage

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[289] PCC Comments at 7; Simrom Comments at 12.

[290] *Broadband PCS Reconsideration Order*, at paras. 162-165.

requirements or construction benchmarks to ensure that licensees deploy their systems throughout their service areas on a phased basis.

170. To ensure comparable treatment of substantially similar services, the *Further Notice* proposed to adopt a uniform "baseline" construction period for all CMRS licensees whose systems do not require an unusually long time to construct. Specifically, we proposed a uniform 12-month construction period for all non-cellular Part 22 systems as well as for conventional and trunked SMR, private paging, Business Radio, and local 220 MHz systems. In addition, although such a step was not required to achieve comparable regulation of CMRS, we sought comment on whether the 12-month construction period should also be extended to PMRS licensees under Part 90.[291] We further proposed to require that licensees not only complete construction but also commence service to the public by the end of this period, which we defined as providing service to at least two parties unaffiliated with the licensee.[292]

171. The *Further Notice* also sought comment on amending our construction rules with respect to wide-area CMRS systems licensed under Part 90 in order to make such rules comparable to the rules applicable to other wide-area CMRS licensees. With respect to wide-area SMR systems, we sought comment on whether we should continue to require licensees to apply for extended implementation or whether we should adopt longer construction periods that would apply automatically to such systems. We asked, for example, whether the 10-year construction period proposed in the *900 MHz Phase II Notice* continued to be a viable approach under the new regulatory regime. With respect to 800 MHz SMR, we noted that a 10-year construction period might be excessive because of the extensive construction of wide-area systems already under way and because 800 MHz licensees are not currently licensed in standard Commission-defined service areas. We therefore sought comment on whether some other form of fixed construction period would be feasible.[293]

172. The *Further Notice* also sought comment on whether to revise our rules relating to construction of wide-area paging systems. We observed that our current paging construction rules in both Part 22 and Part 90 provide for short construction periods because they are tied to the construction of individual stations rather than multi-station systems. Because many paging operators are constructing wide-area systems with multiple sites, however, we noted that a longer construction period for such systems might be more efficient and practical. Specifically, we sought comment on two alternatives: (1) adopting extended implementation procedures for all paging services similar to the rules recently adopted for 929-930 MHz wide-area systems, or (2) adopting Commission-defined service areas for all

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[291] *Further Notice*, 9 FCC Rcd at 2876-77 (para. 62).

[292] *Id.* at 2877 (para. 63).

[293] *Id.* (paras. 64-65).

paging services (other than services on shared channels), with appropriate construction periods based on the size of the area to be served.[294]

173. Commenters generally support our proposal to adopt a uniform 12-month construction period for CMRS licensees with systems that do not require an unusually long time to construct.[295] NABER states that in some cases, the longer 12-month period for Part 90 licensees may alleviate the need for construction extension requests.[296] Simrom would have us apply the 12-month rule to all pending Part 90 system construction, so that such systems would all have an additional four months in which to construct.[297]

174. A number of commenters criticized our proposal that licensees should not only complete construction but also commence service to the public by the end of the construction period, particularly if we define commencement of service as providing service to at least two unaffiliated customers. Some paging licensees suggest that we should only require that the system be capable of operating.[298] Other parties argue that it should be sufficient for a licensee to demonstrate that its system is interconnected with the public switched network.[299] These commenters assert that a system may be legitimately ready for use without having any actual customers, and that requiring licensees to actually acquire customers effectively shortens the construction period.[300] They also argue that construction requirements are a

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[294] *Id.* (para. 66).

[295] *See, e.g.*, Simrom Comments at 15-16; Pittencrieff Comments at 11; NYNEX Comments at 4; PCIA Comments at 15; E.F. Johnson Comments at 17; APACG Comments at 5; Motorola Reply Comments at 2, 12-13; Nextel Reply Comments at 36; *see also* AMTA Reply Comments at 26 (stating that if 220 MHz licensees are reclassified as CMRS, then those licensees should be afforded a 12-month construction period).

[296] NABER Comments at 29-30.

[297] Simrom Comments at 15.

[298] *See, e.g.*, Celpage Comments at 16-17; Metrocall Comments at 15-17; RAM Tech Comments at 15-17; Network Comments at 15-17.

[299] *See, e.g.*, PCIA Comments at 16 (recommending "that a license be deemed to have met this [service commencement] requirement if it has constructed the facilities and they are interconnected to the public switched telephone network (and thus available for service) *or* it is providing service to at least two unaffiliated parties")(emphasis in original); McCaw Comments at 28 (supporting a commencement of service definition that focuses on "the system's interconnection to the public switched telephone network and its capability to provide service"); McCaw Reply Comments at 11. *See also* PageNet Comments at 26; PageNet Reply Comments at 14; APACG Reply Comments at 5.

[300] *See, e.g.*, Celpage Comments at 16-17; *see also* PCIA Comments at 16; PageNet Comments at 26.

sufficient deterrent to spectrum warehousing because they compel licensee investment that must be recovered through providing service, this making an independent service commencement requirement superfluous.[301]

175. Most parties also agree that licensees should have longer than the standard 12-month construction period to construct large or complex CMRS systems.[302] PCIA suggests that the Commission could permit extended construction periods in return for commitments by licensees to develop networks capable of providing service to extended geographic areas.[303] Numerous commenters supported extended construction periods for wide-area SMR systems.[304] Pittencrieff suggests that the Commission allow wide-area SMR licensees five years to construct,[305] while other parties propose a 10-year period.[306] Still others would require SMR applicants to justify the specific period of time required for construction.[307] Nextel suggests that the Commission adopt coverage benchmarks.[308]

176. For wide-area paging, PageNet suggests construction deadlines be tied to the size of the paging system.[309] Other parties suggest construction deadlines based upon size of the market served by the paging system.[310] NABER and APACG propose requiring a licensee

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[301] *See, e.g.*, Celpage Comments at 16-17; Metrocall Comments at 15-17; RAM Tech Comments at 15-17; Network Comments at 15-17.

[302] *See, e.g.*, E.F. Johnson Comments at 17; APACG Comments at 5; AMTA Comments at 7; NABER Comments at 29-30; SEA Reply Comments at 4.

[303] PCIA Comments at 15.

[304] *See, e.g.*, Southern Comments at 13; Pittencrieff Comments at 11; RAM Tech Comments at 9; Geotek Comments at 19-20; CellCall Reply Comments at 11.

[305] Pittencrieff Comments at 11.

[306] RAM Tech Comments at 9; Geotek Comments at 19-20.

[307] E.F. Johnson Comments at 17 (proposing that such justification include providing implementation reports that demonstrate compliance with the construction schedule); *see also* NABER Comments at 31.

[308] Nextel Comments at 44 (proposing that the Commission adopt coverage benchmarks for wide-area SMR similar to those imposed upon PCS licensees).

[309] PageNet Comments at 26. PageNet suggests applying our extended implementation rules recently adopted in the *900 MHz PCP Exclusivity Order* to all wide-area systems, which it defines as systems with a minimum of 30 transmitters.

[310] *See, e.g.*, PCIA Comments at 10-11, 15; Celpage Comments at 18-19; Metrocall Comments at 17-18; RAM Tech Comments at 17-18; Network Comments at 17-18.

who seeks such extension to post a performance bond,[311] while RMR proposes using system forfeiture to enforce compliance.[312] Many parties also propose that 220 MHz licensees be entitled to extended construction periods to construct regional networks.[313] AMTA proposes a three-year construction period for regional 220 MHz systems.[314] Some parties suggest that the extended construction period should provide for interim construction deadlines.[315] USM cautions that the need for extended construction periods must be balanced with the need to make 220 MHz service available quickly.[316]

(2) *Discussion*

177. Except in the case of wide-area CMRS systems discussed below, we will establish a uniform 12-month period for constructing a standard base station in all Part 90 CMRS services.[317] This rule eliminates an obvious disparity between Part 90 and Part 22 and furthers the goal of comparable regulation for all substantially similar services. In addition, for reasons of administrative simplicity, we extend the 12-month construction requirement to PMRS licensees on SMR, 220 MHz, private paging, and Business Radio frequencies. We reject the suggestion of some parties, however, that we should also relax our existing rules with respect to obtaining extensions of the standard construction period.[318] Thus, extensions

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[311] *See* NABER Comments at 31; APACG Comments at 5.

[312] RMR Reply Comments at 11.

[313] *See, e.g.*, USM Comments at 8-9; AMTA Comments at 25-26; Simrom Comments at 13-15; RF Tech Reply Comments at 2.

[314] AMTA Comments at 26; *see also* RF Tech Reply Comments at 2.

[315] *See, e.g.*, USM Comments at 8-9; AMTA Comments at 25-27.

[316] USM Comments at 8 (arguing, therefore, that SunCom's proposal for an eight-year construction period would not meet this objective of rapid delivery of service). It should be noted, however, that SunCom has presented a modified proposal, which calls for a five-year construction schedule. SunCom Comments at 2.

[317] We retain the 18-month construction period for offshore telephone stations. *See* 47 CFR § 22.1035. To the extent not previously applicable, the 12-month construction period will apply to all applications pending or filed as of the effective date of these rules. *See, e.g.*, Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits, Report and Order, 6 FCC Rcd 85 (1990) (applying the settlement limitation to pending applications), *modified on other grounds on reconsideration*, 6 FCC Rcd 2901 (1991). Unless specifically stated otherwise, however, licenses granted prior to the effective date of the rules will continue to be subject to construction requirements in effect at the time of licensing.

[318] NYNEX Comments at 4; PCIA Comments at 15.

will only be granted if the licensee can demonstrate unique circumstances beyond its control that justify an extension.[319]

178. We also will require Part 90 CMRS licensees to commence service to subscribers by the end of the construction period, with "service to subscribers" defined to mean provision of service to at least one party unaffiliated with, controlled by, or related to the providing carrier.[320] This requirement serves the interests of regulatory symmetry by imposing a uniform definition of service commencement on all CMRS services. We have recently adopted this same standard for all Part 22 services in the *Part 22 Rewrite Order*.[321] In addition, this definition of service to subscribers is similar to our current requirement that a cellular base station must provide service to the public within a specified time period,[322] and to our Part 90 requirement that stations be "placed in operation" by the conclusion of the construction period, which is defined to mean having at least one mobile (or, in the case of trunked SMR, two mobiles) in operation.[323] We disagree with commenters who contend that this requirement places an unnecessary burden on licensees or will shorten their actual time to construct. The requirement of securing one customer is hardly burdensome, and there is no evidence in the record to indicate that licensees cannot begin marketing their services

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[319] *See, e.g.*, 47 CFR § 22.142(c). This rule provides that a Part 22 licensees will be granted construction period extensions only if the licensee shows that the failure to complete construction is due to causes beyond his or her control. No extensions will be granted for delays caused by lack of financing, lack of site availability, for the assignment or transfer of control of an authorization, or for failure to order equipment in a timely manner. If the licensee orders equipment within 90 days of the license grant, a presumption of diligence is created). *See also* Application of American Paging, Inc. (of Florida), File No. 24560-CD-MP/ML-85, Order on Reconsideration, 1 FCC Rcd 474 (Com.Car.Bur. 1986) (unavailability of antenna site due to stalled lease negotiations could not be characterized as circumstance beyond the licensee's control); *In re application of Puerto Rico Telephone Co.*, 7 FCC Rcd 5193 (Com.Car.Bur. 1992) (licensee's failure to order equipment in a timely fashion not sufficient grounds to permit an extension); 47 CFR § 90.151 (licensees will be granted waivers of Part 90 rules, including those rules regarding construction requirements, upon, *inter alia*, "a showing that unique circumstances are involved and that there is no reasonable alternative solution within existing rules"). Although the Part 22 and Part 90 rules on waivers are worded differently, we have interpreted them in a uniform manner. For purposes of clarification, we will adopt the more specific language of the Part 22 rule for all CMRS services.

[320] PMRS licensees in these services will continue to be subject to the existing Part 90 requirements for placing stations in operation, *i.e.*, they must place one (or, in the case of trunked SMR systems, two) mobiles in operation, but the mobiles need not be unaffiliated with the licensee. The existing Part 90 definition of "placed in operation" will also apply until August 10, 1996, to reclassified Part 90 CMRS licensees who are grandfathered under the provisions of the Budget Act.

[321] *Part 22 Rewrite Order*, at para. 33. 47 CFR § 22.99.

[322] 47 CFR § 22.43(c) (current rule).

[323] *See* 47 CFR §§ 90.155(a), 90.155(c).

prior to completing construction. We also disagree with commenters who assert that the requirement is superfluous or unenforceable. While costs incurred for auctions, construction, and interconnection will likely provide incentive to most licensees to commence service as quickly as possible, it remains possible that a licensee could choose to construct minimal facilities in order to warehouse spectrum rather than provide actual service. Thus, the service commencement requirement serves as an added safeguard against such behavior. In addition, we have not experienced undue enforcement problems with this type of requirement in the past and do not anticipate them here.

179. With respect to CMRS systems licensed on a wide-area basis, the record generally supports use of longer construction periods combined with interim coverage requirements to ensure that licensees begin providing service to portions of their service area before the construction period expires. This approach has been used for cellular service and recently adopted for both broadband and narrowband PCS. We now conclude that 800 and 900 MHz SMR systems licensed on an MTA basis should be subject to similar requirements, although these requirements will also be tailored to reflect certain circumstances that are unique to the SMR service.

180. At 800 MHz, we will seek further comment on construction requirements for MTA licensees in our Further Notice of Proposed Rule Making in PR Docket 93-144. Based on the record developed thus far, our preliminary view is that licensees who receive MTA-based authorizations should be subject to interim coverage requirements that are similar to those in the cellular and PCS rules. These rules, however, must account for the fact that MTA licensees may be required to provide co-channel protection to incumbent systems within their service area. We therefore will defer the issue of coverage requirements for consideration in our Further Notice in the Docket 93-144.

181. To the extent that we conclude in our follow-on proceeding in docket 93-144 that some 800 MHz SMR channels should continue to be licensed on a conventional station-by-station basis,[324] we intend to apply the standard 12-month construction period discussed above. In addition, we seek comment in that proceeding on whether we should cease accepting requests pursuant to Section 90.629 for extended construction authority on such channels. The purpose of our proposed MTA licensing plan described above is to replace this prior form of wide-area licensing and to reserve certain SMR channels for continued licensing on a site-by-site basis to accommodate local dispatch systems. We are concerned that continuing to grant extended implementation on these channels would undercut this goal and preempt other possible uses of the spectrum. This decision will not affect existing 800 MHz licensees who have previously received extended implementation authority, however. We will allow all such licensees to continue construction under their currently authorized construction timetables.

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[324] *See* para. 105, *supra.*

182. At 900 MHz, we are adopting construction requirements for MTA licensees similar to those established for other wide-area CMRS licensees such as cellular and broadband PCS and proposed for 800 MHz licensees. In the *900 MHz Phase II Notice*, we proposed that nationwide licensees would have ten years to construct, but that regional licensees be required to construct facilities in 40 percent of their service areas within two years of licensing and in all portions of their service area within five years. Because we are using MTAs as opposed to nationwide licensing for 900 MHz systems, we believe that the five year construction requirement is appropriate. We will revise the coverage elements of our original proposal, however, to establish coverage requirements based on population within the licensee's service area. Details of these requirements will be addressed in our final Report and Order in the 900 MHz Phase II proceeding. All non-MTA licensees will continue to be subject to their existing construction requirements.

183. With respect to paging services, the record supports the concept of allowing extended construction periods for CMRS wide-area paging systems, as we have done for 929-930 MHz private paging systems in the *PCP Exclusivity Order*. We are not prepared to implement such rules at this time, however. As discussed above and in our *Part 22 Rewrite Order*, we believe this issue requires further exploration in conjunction with the issue of implementing market-based licensing for CMRS paging generally. We will therefore defer changes to our existing rules for the time being.

184. We also defer the question of extended implementation for 220 MHz systems until we can undertake a fuller consideration of market-based licensing in that service. We recognize, however, that many existing non-nationwide 220 MHz licensees have immediate concerns regarding the pending December 2, 1994, construction deadline, due to the limited availability of 220 MHz equipment to meet pending orders. As some commenters have pointed out, 220 MHz technology is highly specialized and available from only a few manufacturers, making it difficult for licensees who have placed timely orders to receive equipment by that date.[325] Notwithstanding our deferral of the issue of extended implementation generally, therefore, we believe a short-term extension of our pending construction deadline for 220 MHz licensees is appropriate. We are therefore extending the December 2, 1994 deadline for construction to April 4, 1995, which should provide sufficient time for licensees who have placed timely equipment orders to construct their stations. This four-month extension gives these licensees approximately 12 months from the date of our original construction order to complete construction and commence operations, thus corresponding to the 12-month construction period we are adopting for all newly licensed CMRS providers under this Order.

b. Loading Requirements

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[325] *See* Letter from A. Shark, President, AMTA, to R. Haller, Chief, Private Radio Bureau, FCC, dated Aug. 4, 1994. The letter was submitted on behalf of the three manufacturers of 220 MHz equipment indicating that they are facing a significant backlog in meeting equipment orders.

(1) *Background and Pleadings*

185. As we observed in the *Further Notice*, loading requirements are one of the mechanisms we employ under our rules to ensure that mobile service licensees make efficient use of spectrum and offer service to customers within their service area.[326] Specifically, SMR licensees must meet mobile loading requirements in order to (1) obtain exclusive use of existing channels,[327] (2) obtain additional channels,[328] (3) serve areas within 40 miles of existing channels,[329] and (4) avoid automatic cancellation of authorizations for unloaded channels at renewal.[330] We generally have not imposed loading requirements on other Part 90 services, however.[331] In Part 22 we required traffic loading studies for applications requesting more than one channel for a new station, or one or more additional channels for an existing station in the paired spectrum designated for on-way or two-way mobile operations. This requirement has been eliminated in our *Part 22 Rewrite Order.*[332]

186. In the *Further Notice*, we sought comment on the degree to which we should continue to use loading standards as a means of ensuring efficient spectrum use by CMRS licensees. Noting that mobile loading requirements are not imposed on Part 22 licensees and that we had already proposed to eliminate traffic loading studies, we proposed to eliminate such requirements for those Part 90 services that we determine to be "substantially similar" to Part 22 services. Our proposal was premised on: (a) the Congressional goal of regulatory symmetry for substantially similar CMRS services; (b) the expectation that in services where licenses are awarded by auction, licensees will have greater incentives to use their authorizations efficiently; and (c) our conclusion, based on our experience, that spectrum warehousing concerns can be adequately addressed by other means, such as strict construction and coverage requirements. In this regard, we sought comment on alternative measures that could be used to protect against spectrum warehousing if we eliminated loading requirements as proposed.[333]

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[326] *Further Notice*, 9 FCC Rcd at 2877 (para. 67).

[327] 47 CFR §§ 90.631(a) (trunked systems), 90.633(a), 90.633(b) (conventional systems).

[328] *Id.*, §§ 90.631(c) (trunked), 90.633(e) (conventional).

[329] *Id.*, §§ 90.623(c) (conventional), 90.627(b) (trunked).

[330] *Id.*, § 90.631(b) (applies only to trunked SMR systems initially licensed on or prior to June 1, 1993).

[331] *But see* 47 CFR § 90.313(a)(3) (requirement that Business Radio licensees in 470-512 MHz band load their systems to obtain exclusivity).

[332] *Part 22 Rewrite Order*, at para. 48.

[333] *Further Notice*, 9 FCC Rcd at 2878 (paras. 70-71).

187. The *Further Notice* also sought specific comment on whether to eliminate the various elements of our loading rules applicable to SMR licensees. We tentatively concluded that all loading requirements should be eliminated in the case of wide-area SMR systems, and that the absence of loading requirements for any Part 22 services suggested they should be eliminated for traditional SMR systems as well. We noted that elimination of the "40-mile rule" would make it easier for SMR licensees to cover their service areas with low power stations located in close proximity to one another. We also proposed to eliminate the use of loading as the basis for automatic cancellation of authorizations, noting that this aspect of our loading requirements has already been partially phased out and may no longer serve a useful purpose.[334] Finally, we sought comment on whether it would be either necessary or practical to retain loading requirements for SMR licensees that remain classified as PMRS if we eliminate them for all SMR licensees reclassified as CMRS.[335]

188. Commenters broadly support our proposal to eliminate the loading requirements applicable to those Part 90 services that are reclassified as CMRS.[336] Motorola asserts that this is an important step towards our goal of regulatory symmetry because Part 22 licensees are not subject to such requirements.[337] Some commenters also argue that loading requirements in fact have created competitive disadvantages for some Part 90 licensees.[338] Aside from regulatory symmetry concerns, many commenters argue that loading requirements no longer serve a valid purpose.[339] PageNet and PCIA, for example, contend

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[334] *Id.* at 2879 (para. 73). In this regard, we incorporated a petition for rule making filed by AMTA on repeal of the automatic cancellation provision into this docket. Petition for Rule Making, RM-8387, filed Oct. 29, 1993.

[335] *Id.* at 2878-79 (paras. 71-73).

[336] APACG Comments at 11; AMTA Comments at 11; AMTA Reply Comments at 15; Brown Comments at 13; CellCall Reply Comments at 9; Celpage Comments at 19; Geotek Comments at 21; Geotek Reply Comments at 13; Metrocall Comments at 18; Motorola Reply Comments at 14; NABER Comments at 32; Network Comments at 18; Nextel Reply Comments at 45; NYNEX Comments at 4; PageNet Comments at 27; PCIA Comments at 17; PCIA Reply Comments at 13; Pittencrieff Comments at 11; RMD Comments at 10; RAM Tech Comments at 18; RMR Reply Comments at 13; WJG Comments at 7.

[337] Motorola Reply Comments at 14. *See also* Pittencrieff Comments at 11 (noting absence of channel aggregation restrictions for cellular and PCS licensees).

[338] NABER Comments at 32-33 (suggesting that rules penalize even those operators who genuinely attempted to load their systems despite the availability of significant spectrum in the same area); RMR Reply Comments at 13 (contending that rules hinder implementation and delivery of advanced services).

[339] AMTA Comments at 12; Brown Comments at 13; CellCall Reply Comments at 9; Motorola Reply Comments at 14; NABER Comments at 32-33; RMR Reply Comments at 13.

that loading requirements are unnecessary because spectrum warehousing no longer presents a significant threat in today's CMRS marketplace.[340] According to this view, existing competition in the marketplace creates sufficient incentives for licensees not to allow spectrum to lie fallow.[341]

189. Other commenters take the view that although spectrum warehousing continues to be a threat, it can be better addressed by means other than loading requirements.[342] In this connection, numerous commenters urge the Commission to adopt alternative measures to ensure efficient spectrum use.[343] The majority of these commenters advocate the adoption of construction benchmarks and coverage requirements[344] combined with our strict enforcement of such requirements.[345] New Par contends that such construction deadlines should be comparable to those with which cellular licensees must comply.[346] Brown recommends that 800 and 900 MHz SMRs seeking to acquire additional channels be subject to the same "objective need" standards applicable to Part 22 licensees.[347] APACG and WJG recommend reliance on the finder's preference program as a vehicle to identify spectrum that is not being utilized efficiently.[348]

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[340] PageNet Comments at 27; PCIA Comments at 17.

[341] PageNet Comments at 27; PCIA Comments at 17; RMD Comments at 10. For example, AMTA opines that the threat of spectrum warehousing is further limited in the 800 MHZ SMR band because few unassigned channels remain; moreover, the remaining channels are in the most unpopulated areas. AMTA Comments at 13. *But see id.* at 13 n.8.

[342] APACG Comments at 11; CellCall Reply Comments at 10; RMD Comments at 10; WJG Comments at 7.

[343] AMTA Comments at 12-13; AMTA Reply Comments at 15; Cell Call Reply Comments at 10; Dial Page Reply Comments at 6; Geotek Comments at 21; NYNEX Comments at 4; Pittencrieff Comments at 11-12; Southern Comments at 7; Southern Reply Comments at 5-6.

[344] AMTA Comments at 12-13; AMTA Reply Comments at 15; CellCall Reply Comments at 10; Dial Page Reply Comments at 6; Geotek Comments at 21; NYNEX Comments at 4; Pittencrieff Comments at 11-12.

[345] Southern Comments at 7; Southern Reply Comments at 5-6.

[346] New Par Comments at 11-12.

[347] Brown Comments at 13-14.

[348] APACG Comments at 11; WJG Comments at 7. Moreover, WJG advocates the expansion of our finder's preference rules applicable to Part 90 services to public coast stations. We believe that WJG's proposal is beyond the scope of this proceeding; thus, at this time, we express no opinion as to the propriety of such action.

(2) *Discussion*

190. We conclude that the record supports eliminating loading requirements for the future licensing of all Part 90 CMRS providers. Based on our view of existing and potential competition in the CMRS marketplace, we believe that continuing to impose mobile loading requirements on some CMRS providers but not others contravenes the Congressional goal of regulatory symmetry and could unfairly impair the ability of certain licensees to compete. We also conclude that the preferable means of achieving comparable regulation for all CMRS in this context is to eliminate loading requirements rather than expanding their use. We conclude that alternative measures discussed elsewhere in this Order will be sufficient to protect against spectrum warehousing in CMRS services. Specifically, we agree with those commenters who advocate a strong regulatory emphasis on construction timetables and coverage requirements in lieu of loading requirements.

191. Our conclusion that mobile loading requirements should be eliminated for CMRS is consistent with our course of action in other recent proceedings. In our recently adopted *Part 22 Rewrite Order*, for example, we eliminated all traffic loading study requirements based on our conclusion that traffic loading studies are not a reliable indicator of efficient channel usage and that these studies are burdensome both for licensees to prepare and for Commission staff to evaluate.[349] In narrowband and broadband PCS, we found minimum construction requirements sufficient to ensure spectrum efficiency in the absence of loading requirements.[350] Moreover, in considering whether to adopt loading requirements for services such as Part 90 paging, and 220 MHz service, we have concluded that loading is not a reliable indicator of efficient channel usage and that spectrum warehousing concerns can be adequately addressed by other means.[351] We believe these conclusions are applicable to CMRS services generally.[352]

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[349] *Part 22 Rewrite Order*, at para. 48.

[350] Amendment of the Commission's Rules To Establish New Narrowband Personal Communications Services, GEN Docket No. 90-314, First Report and Order, 8 FCC Rcd 7162, 7168 (paras. 36-37) (1993) (*Narrowband PCS Order*), *recon.*, Memorandum Opinion and Order, 9 FCC Rcd 1309 (1994) (*Narrowband PCS Reconsideration Order*), *further recon.* Second Memorandum Opinion and Order, FCC 94-218, released Aug. 25, 1994; *Broadband PCS Order*, 8 FCC Rcd at 7754 (para. 134).

[351] *900 MHz PCP Exclusivity Order*, 8 FCC Rcd at 8327 (para. 26); *220 MHz Order*, 6 FCC Rcd at 2367 (para. 81). Similarly, in our *800 MHz EMSP* and *900 MHz Phase II* proceedings, we have proposed to rely on construction and coverage requirements instead of loading standards for wide-area SMRs. *800 MHz EMSP Notice*, 8 FCC Rcd at 3954, 3959 (paras. 19, 37); *900 MHz Phase II Notice*, 8 FCC Rcd at 1477 (para. 32 n.74).

[352] It should be noted, however, that this proceeding does not address or propose to eliminate loading requirements currently applicable to Part 90 services that are exclusively classified as PMRS.

(continued...)

192. The Part 90 service most affected by our elimination of loading requirements will be the SMR service. First, we agree with the vast majority of commenters that mobile loading requirements with respect to the 40-mile rule should be eliminated.[353] As PCC notes, the 40-mile rule served a significant regulatory purpose during the initial development of the SMR industry by preventing strategic manipulation of the Commission's licensing procedures to warehouse spectrum.[354] In the future, however, SMR licensing will largely be based on auctions of channel blocks in Commission-defined service areas. In addition, even to the extent that we continue to license some 800 MHz SMR systems on a station-by-station basis, we conclude that the 40-mile rule no longer serves its intended purpose, and could in fact hamper the industry's continued growth and competitive position with other CMRS licensees.

193. Second, we conclude that loading should no longer be a prerequisite for conventionally licensed SMR licensees to obtain additional channels.[355] As discussed above with regard to the 40-mile rule, we believe that this requirement also has outlived its regulatory purpose; rather, it could ultimately impose a competitive disadvantage upon those SMR licensees reclassified as CMRS. In this connection, we believe the preferable course of action is to adopt a standard comparable to that adopted in our *Part 22 Rewrite Order*.[356] Consequently, where SMRs continue to be licensed on a channel-by-channel basis, licensees will be required to complete construction and commence service to subscribers in an area before additional channels can be sought. Because this prerequisite is consistent with our additional channel policy adopted in the *Part 22 Rewrite Order*, we conclude that this action furthers our regulatory symmetry objective.

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[352](...continued)
Thus, licensees on Business, Industrial, and Land Transportation channels above 800 MHz will continue to be subject to loading standards. Our conclusions here also do not preclude adoption of the proposal in the *Refarming Notice* proceeding to use loading standards on certain below-512 MHz channels to identify PMRS licensees whose consent is required to designate a channel as exclusive. *See* Replacement of Part 90 by Part 88 To Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, PR Docket No. 92-235, Notice of Proposed Rule Making, Appendix A, 7 FCC Rcd 8105, 8117 (1992)(*Refarming Notice*).

[353] *See, e.g.*, AMTA Reply Comments at 15; CellCall Reply Comments at 9-10; Dial Page Reply Comments at 6; PCC Comments at 9; RMD Comments at 10; RMR Reply Comments at 13; SMR Operators Reply Comments at 35.

[354] PCC Comments at 9-10.

[355] Loading requirements for channel aggregation purposes are also inapposite in the case of SMR channels licensed on an MTA basis because our competitive bidding procedures will govern the ability of applicants to aggregate channel blocks.

[356] *See Part 22 Rewrite Order*, at para. 49.

194. We conclude that elimination of the automatic cancellation element of our SMR loading rules is warranted at 800 MHz, but that it should be retained at 900 MHz to the limited extent it applies to incumbent non-MTA licensees. We agree with commenters that the 800 MHz SMR service has matured to the point where the continued enforcement of this rule no longer serves a public interest purpose.[357] At 900 MHz, however, the SMR market is significantly less mature, both because initial licensing occurred more recently than at 800 MHz and because 900 MHz systems operate in limited service areas. In addition, unlike our PCS and cellular rules, our original 900 MHz SMR rules did not require licensees to achieve significant coverage of their designated service areas in order to retain their authorizations. We therefore conclude that eliminating the cancellation requirement for these licensees could result in inefficient spectrum use in this band. Our decision to retain the cancellation requirement is limited in two respects, however. First, we have previously granted 900 MHz licensees who failed to load their systems after five years limited relief from the automatic cancellation requirement by granting such licensees a two-year renewal to make additional efforts to load their systems.[358] We will continue to apply this rule so that all incumbent 900 MHz licensees will have seven years from their initial authorization to meet the loading requirement. Second, an incumbent licensee who obtains an MTA-based 900 MHz license will be exempted from any previously applicable loading requirements for channels covered by the MTA authorization.

195. Finally, there is the issue of whether loading requirements should be eliminated for PMRS as well as CMRS SMR licensees. Although some commenters believe that only wide-area licensees should be relieved of loading obligations,[359] most commenters did not draw a distinction between SMR providers based on regulatory classification, and some commenters expressly support removing loading requirements for all SMR providers.[360] We conclude that the question of loading turns on the manner in which our licensing rules operate to prevent warehousing, not on the regulatory classification of individual licensees. It would also be impractical to eliminate loading requirements for CMRS providers on SMR channels while retaining them for PMRS providers on the same channels. Therefore, to the

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[357] This decision applies to all 800 MHz SMR licensees, including any licensee who has previously requested or been granted a stay of the automatic cancellation requirement pending the disposition of this rule making. *See Further Notice*, 9 FCC Rcd at 2879 (para. 73 n. 133). Based on our disposition of this issue, we are also dismissing AMTA's Petition for Rule Making regarding the automatic cancellation rule as moot.

[358] Amendment of Section 90.631 of the Commission's Rules and Regulations Concerning Loading Requirements for 900 MHz Trunked SMR Stations, PR Docket No. 92-17, Report and Order, 7 FCC Rcd 4914 (1992).

[359] 8 FCC Rcd at 8324 (paras. 18-19).

[360] *See, e.g.*, RMR Reply Comments at 13 (arguing for elimination of rules for all SMR systems); PCC Comments at 9 (advocating elimination of 40-mile rule for all SMR systems).

extent that SMR providers are licensed on an MTA basis, we see no reason to impose loading requirements based on regulatory classification. Similarly, we conclude that all conventionally licensed SMR licensees -- whether PMRS or CMRS -- should have the flexibility to construct systems based on a network of transmitters spaced less than 40 miles apart, and that warehousing can be adequately prevented by strict enforcement of the 12-month construction requirement and the prohibition of a licensee's acquisition of additional channels in an area until existing channels are constructed and in operation.

c. User Eligibility

(1) *Background and Pleadings*

196. The historical distinction between common carriage and private radio has resulted in entirely different approaches to user eligibility under Part 90 and Part 22. Because private radio services are dedicated to use by a defined group of eligible users, Part 90 sets forth specific limitations on who is eligible to use each service. In the case of those Part 90 services that are subject to reclassification as CMRS, these restrictions are relatively minor, as only foreign governments and their representatives are not eligible to obtain service from SMR, private paging, or 220 MHz licensees.[361] Business Radio licensees also may not serve foreign governments or their representatives and are also restricted from serving government entities or individuals who do not have a business use for the service.[362] Nonetheless, these restrictions contrast with Part 22, which contains no user eligibility restrictions of any kind because such restrictions would conflict with common carriers' statutory obligation, under Sections 201 and 202 of the Communications Act, to provide service upon reasonable request.

197. Because amended Section 332(c)(1)(A) subjects all CMRS providers to the common carrier requirements of Sections 201 and 202, Part 90 licensees who are reclassified as CMRS must offer service to the public that is not unjustly or unreasonably discriminatory. The *Further Notice* thus proposed to eliminate all user eligibility limitations applicable to

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[361] Section 90.115 of the Commission's Rules restricts foreign governments or their representatives from obtaining a station authorization in any Part 90 radio service. Because our SMR, 220 MHz, and private paging rules limit licensees to providing service to Part 90 eligibles, Federal Government representatives, and private individuals, foreign governments and their representatives are also ineligible to obtain service from these providers. *See* 47 CFR §§ 90.494(a), 90.603(c), 90.645(b), 90.703(c), 90.733(a)(2).

[362] 47 CFR §§ 90.61, 90.75(a), 90.75(c)(10), 90.115. Section 90.75 generally limits Business Radio eligibility to persons engaged in commercial (or analogous non-profit) activities, except that Business Radio licensees on paging channels may provide paging service to private individuals or Federal Government representatives. *See* Amendment of the Commission's Rules To Permit Private Carrier Paging Licensees to Provide Service to Individuals, PR Docket No. 93-38, Report and Order, 8 FCC Rcd 4822 (1993).

CMRS providers licensed under Part 90 so that such licensees may serve the public without restriction.[363]

198. Most commenting parties agree that user eligibility restrictions should be eliminated for Part 90 CMRS providers.[364] Some of these parties argue that eliminating the restrictions will help achieve regulatory parity among various CMRS providers and will enable CMRS providers to offer service to the public on a non-discriminatory basis.[365] RMD urges the Commission to go further, and eliminate user eligibility restrictions for all SMR systems.[366] RMD also urges that we expressly eliminate user eligibility restrictions for representatives of foreign governments.[367]

199. Other parties disagree with the elimination of user eligibility restrictions.[368] AMTA argues generally that we should retain Part 90 user eligibility rules.[369] US Sugar argues that our proposed user eligibility rules, by requiring small CMRS providers to offer service to the public on a non-discriminatory basis, are impractical because the limited number of channels and the limited scope of available service will make it impossible to serve all who make reasonable requests for carriage.[370]

(2) *Discussion*

200. We agree with the majority of commenters that user eligibility restrictions should be eliminated for CMRS providers licensed under Part 90. Eliminating these restrictions will help achieve regulatory parity among various CMRS providers and enable CMRS providers to offer service to the public on a non-discriminatory basis. Accordingly, we modify our existing user eligibility restrictions to the extent that they prevent SMR, private carrier paging, Business Radio, and commercial 220 MHz licensees from providing service to

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[363] *Further Notice*, 9 FCC Rcd at 2879 (para. 75).

[364] *See, e.g.*, PageNet Comments at 27; Celpage Comments at 19; PCIA Comments at 18; Motorola Reply Comments at 2, 14-15.

[365] *See* Pittencrieff Comments at 12; PCIA Comments at 18.

[366] RMD Comments at 10.

[367] *Id.* (claiming that the underlying basis for that restriction "lost its meaning once other previously forbidden user categories," such as individuals and the Federal Government, "were eliminated").

[368] *See* AMTA Comments at 8; US Sugar Comments at 13.

[369] AMTA Comments at 8.

[370] US Sugar Comments at 13.

foreign governments and their representatives. In addition, we will remove the current Business Radio restriction on service to the Federal Government and individuals. We disagree with the claim of U.S. Sugar that the elimination of eligibility rules is impractical because the limited number of channels and the limited scope of available service will make it impossible for small CMRS providers to serve all who make reasonable requests for carriage. As we explained in the *CMRS Second Report and Order*, a service with low system capacity may nonetheless be available to the public.[371]

d. Permissible Uses

(1) *Background and Pleadings*

201. The *Further Notice* addressed a variety of rules in Part 90 and Part 22 that limit the permissible uses of particular types of mobile radio systems licensed under each rule part. First, we noted that Part 22 and Part 90 contain similar rules requiring mobile radio facilities to be used primarily for communication between base stations and mobile units, although other incidental or emergency uses are allowed.[372] We also noted that Part 22 prohibited the concurrent licensing of base stations for any non-common carrier purpose,[373] while private land mobile stations are prohibited from providing broadcasting or common carrier service.[374] Part 90 licensees are also subject to rules requiring transmissions to be of minimum practicable duration and that communications relating to safety of life or property be given priority.[375] Finally, licensees on shared frequencies may only transmit communications that are directly related to the activity that renders them eligible for a station license.[376]

202. In the *Further Notice*, we tentatively concluded that while some restrictions on permissible uses of Part 90 and Part 22 systems (*e.g.*, restrictions on fixed base-to-base communications) did not require amendment or modification, other rules needed to be changed to conform to the new regulatory structure and ensure comparable regulatory

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[371] *CMRS Second Report and Order*, 9 FCC Rcd at 1441-42 & n.144 (para. 69).

[372] 47 CFR §§ 22.509 (general Part 22 current rule); 22.911 (cellular current rule); 90.405 (general Part 90 rule), 90.645 (SMR), 90.733 (220 MHz). Part 22 and Part 90 stations may generally transmit communications related to emergencies, civil defense, or imminent safety concerns. *See* 47 CFR §§ 22.210 (current rule), 22.308 (current rule), 90.405, 90.407, 90.411, 90.417(a).

[373] 47 CFR § 22.119 (current rule). We have eliminated this rule in a separate proceeding. *Part 22 Rewrite Order*, at paras. 67-71.

[374] 47 CFR § 90.415.

[375] 47 CFR §§ 90.403(c), 90.403(d).

[376] 47 CFR § 90.405(a).

treatment of similar services. Specifically, we proposed to eliminate the Part 90 prohibition on common carrier service as it applies to SMR, 220 MHz, Business Radio, and Part 90 paging licensees, so that such licensees would be able to provide CMRS services. We also sought comment on whether other rules related to permissible communications are any longer relevant under the revised regulatory regime for mobile services. For example, we suggested eliminating Part 90 CMRS limits on purpose of communications and on the duration of messages, except that we proposed to retain the limit on message duration in the case of systems on shared spectrum because the rule helps to assure that all co-channel licensees have the maximum possible access to air time.[377]

203. Many parties support lifting Part 90 permissible use restrictions for CMRS providers licensed under this rule part.[378] Pittencrieff favors lifting these restrictions particularly for reclassified SMRs.[379] AMTA recommends eliminating permissible use restrictions for wide-area SMRs, although it proposes to retain existing rules for other Part 90 services.[380] Some parties favor retaining restrictions for shared, as opposed to exclusively used, channels to maximize available airtime.[381] API argues for retention of permissible use rules for PMRS, which are often shared assignments. API believes these rules are necessary to alleviate spectrum congestion in PMRS.[382]

204. Some parties cite additional use restrictions that they contend the Commission should revisit or clarify. AMTA asks that we delete Section 90.977(b) of our rules, which makes interconnection with the public switched network secondary to dispatch use for shared systems in the 806-824, 851-869, 896-901, and 935-940 MHz bands, as this restriction is no longer required by statute.[383] RMR objects to this change as harmful to existing licensees, and suggests instead that the requirement regarding shared payments for telephone service in Section 90.977(b)(2) not apply to CMRS. Finally, WJG asks that we permit public coast stations to provide land mobile radio service on a secondary basis.[384]

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[377] *Further Notice*, 9 FCC Rcd at 2880 (paras. 78-79).

[378] *See, e.g.*, PageNet Comments at 27-28; US West Comments at 8-9; New Par Comments at 12.

[379] Pittencrieff Comments at 12.

[380] AMTA Comments at 8.

[381] NABER Comments at 33-34. *See also* PCIA Comments at 18-19; Celpage Comments at 19; Metrocall Comments at 19; Network Comments at 19; RAM Tech Comments at 18-19.

[382] API Comments at 8.

[383] AMTA Comments at 7.

[384] WJG Comments at 7-8.

205. Some parties argue that the regulatory parity objectives of the statute require the broader elimination of restrictions on Part 22 as well as Part 90 services. Bell Atlantic, CTIA, GTE, and McCaw note that our PCS rules allow licensees to provide both CMRS and PMRS offerings under a single license, and argue that all CMRS licensees, including cellular operators, should have the same flexibility.[385] McCaw believes that the permissible uses of cellular, ESMR, and PCS should be conformed so that licensees in these services can compete on an equal footing.[386] CTIA also observes that cellular providers are subject to resale obligations that are not imposed on other mobile service providers.[387]

(2) *Discussion*

206. The Budget Act requires us to eliminate use restrictions that conflict with the revised statutory classification of mobile services or with the goal of symmetrical regulation for substantially similar CMRS services. To this end, we adopt our proposal to delete the Part 90 restriction on common carrier communications as it applies to SMR, 220 MHz, Business Radio, and Part 90 paging services. This restriction conflicts with Section 332 because under the statute, CMRS providers in these services are providing common carrier service by definition. Thus, we affirm that licensees in these services may provide either CMRS or PMRS offerings.[388] We will, however, continue to prohibit common carrier communications in other Part 90 services, which are restricted to PMRS offerings only.

207. We will also exempt Part 90 CMRS providers from the requirement that permissible communications be related to the activities that make the licensee eligible in the service.[389] CMRS licensees are subject to the common carrier obligation to serve the public under Section 201 of the Act. Thus, they may not restrict use of their facilities based on the purpose of the communication. In addition, the restriction serves no practical purpose in the CMRS context because eligibility for CMRS is not restricted to specialized classes of radio users.[390] For similar reasons, we will not subject reclassified Part 90 licensees on exclusive

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[385] Bell Atlantic Reply Comments at 4; CTIA Comments at 6-7; GTE Comments at 4-6; McCaw Comments at 6-8.

[386] McCaw Comments at 8.

[387] CTIA Comments at 7.

[388] We intend to explore licensing procedures and rules for the case of combined CMRS and PMRS operation in a future proceeding. *See* Section III.E.11.b, *infra*.

[389] *See, e.g.*, 47 CFR §§ 90.405, 90.645, 90.733.

[390] *See CMRS Second Report and Order*, 9 FCC Rcd at 1441 (para. 68) (eligibility rules for all types of SMRs, commercial 220-222 MHz land mobile systems, and private carrier paging systems, include individuals as a category of eligible customers; end user eligibility is virtually unrestricted in Business Radio Service).

channels to the requirement that communications be of minimum duration, as their Part 22 counterparts are not subject to comparable restrictions. We will, however, retain this requirement for CMRS licensees on shared channels in order to maximize efficient use of spectrum by multiple licensees.

208. We also agree with commenters that Part 90 rules restricting interconnection in certain private radio services should not be applied to CMRS, which is by definition an interconnected service. Therefore, existing Part 90 rules that relegate interconnected service to secondary status, limit types of interconnection, or otherwise place conditions on the provision of interconnection will not be applicable to CMRS providers. We conclude, however, that WJG's request to permit public coast stations to provide two-way land mobile radio service is beyond the scope of this proceeding. This issue does not involve a disparity between common carrier services and reclassified private services, because public coast stations were regulated as common carriers prior to the Budget Act. In any event, the issues raised by WJG are being addressed in a separate proceeding.[391]

209. Finally, we address the issue of whether all CMRS licensees, including cellular operators, should have the same flexibility as PCS licensees to provide both CMRS and PMRS offerings under a single license. First, we note that some of the regulatory parity concerns of common carrier commenters are mitigated by our decision in the *Part 22 Rewrite Order* to allow common carrier transmitters to be licensed for simultaneous non-common carrier uses.[392] With regard to the suggestion that Part 22 licensees should have the same flexibility as other CMRS licensees to provide PMRS offerings under their existing authorizations, this issue has been raised by petitioners seeking reconsideration of the *CMRS Second Report and Order*. We will address the issue in that proceeding. Similarly, we decline to address the issue of resale obligations for cellular or other CMRS providers in this proceeding, as these issues are being addressed in a separate docket.[393]

e. Station Identification

(1) *Background and Pleadings*

210. In the *Further Notice*, we observed that both Part 90 and Part 22 require some form of station identification at regular intervals in most services, and requested comment on the circumstances under which these rules could be conformed or even eliminated. For example, noting that cellular and nationwide 220 MHz licensees are exempt from station identification requirements, we asked whether other CMRS services operating on a

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[391] Amendment of the Commission's Rules Concerning Maritime Communications, PR Docket No. 92-257, Notice of Proposed Rule Making and Notice of Inquiry, 7 FCC Rcd 7863 (1992).

[392] *Part 22 Rewrite Order*, at paras 67-71.

[393] *See CMRS Equal Access and Interconnection Notice*.

nationwide basis or in large, Commission-defined service areas should be similarly exempt. We tentatively concluded, however, that transmission of station identification might still be necessary for licensees operating in station-defined service areas because identification by other means would be more difficult.[394]

211. The *Further Notice* also sought comment on ways in which station identification rules we deem to be necessary could be made more consistent and less burdensome. Specifically, we proposed to adopt a general rule that all CMRS licensees operating multi-station systems be allowed to use a single system-wide call sign. We noted that such an approach had previously been proposed for all Part 22 services in the *Part 22 Rewrite Notice* and for wide-area SMR licensees in the *800 MHz EMSP Notice*. We also sought comment on whether all CMRS licensees should be allowed to transmit call signs digitally, as is currently allowed under Part 90.[395]

212. The comments generally support simplifying or eliminating station identification requirements for CMRS systems operating on exclusively licensed channels while retaining existing requirements for systems operating on shared channels. Brown argues that station identification should be eliminated on exclusive channels because it impedes services such as data transmission that rely on uninterrupted transmissions and because the identity of licensees on exclusive channels can be ascertained by other means.[396] Other comments support eliminating identification requirements for nationwide 900 MHz paging[397] and SMR systems.[398] Some parties would retain the station identification rules for traditional SMRs, but adopt rules paralleling those in the cellular service for wide-area SMRs.[399]

213. PCIA supports eliminating station identification requirements for exclusive channel licensees serving well-defined geographic regions as they can be easily identified through Commission records, or where prior coordination has taken place and station contours are a matter of public record.[400] Otherwise, PCIA would retain station identification requirements.[401] PageNet supports retention of the rule, particularly for shared channels, with

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[394] *Further Notice*, 9 FCC Rcd at 2880 (para. 81).

[395] *Id.* (paras. 80-82).

[396] Brown Comments at 15-16. *See also* RAM Tech Comments at 10-11.

[397] NABER Comments at 34.

[398] *Id.*; AMTA Comments at 16 (800 MHz SMRs).

[399] *E.g.*, Motorola Reply Comments at 15.

[400] PCIA Comments at 29. *See also* RAM Tech Comments at 10-11.

[401] PCIA Comments at 19-20.

some revisions.[402] E.F. Johnson also favors retention of some form of station identification requirements, arguing that such obligations are not overly burdensome because automatic equipment can be used to meet them.[403] RMR, a small SMR operator, believes that station identification requirements should be expanded, not relaxed.[404]

214. The overwhelming majority of parties commenting on the question favor using a single call sign instead of multiple call signs for commonly owned facilities.[405] US West generally favors standardization of station identification requirements for CMRS services.[406] With respect to the frequency and timing of call sign transmissions, NABER proposes hourly identification at the top of every hour.[407] RMR opposes NABER's proposal for an on-the-hour identification requirement, however, on the grounds that it would add to licensee costs with little corresponding benefit.[408] Other commenters favor requiring station identification every thirty minutes.[409]

215. Several parties support allowing digital transmission of call signs.[410] PageNet states that the parameters, in terms of format and data speed acceptable to the Commission, must be clearly defined.[411] PageNet adds that the Commission should take into account the

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[402] PageNet Comments at 28-29 (retention of station identification especially necessary for 900 MHz private carrier paging as these frequencies remain shared).

[403] E.F. Johnson Comments at 19.

[404] RMR Reply Comments at 12.

[405] AMTA Comments at 16; Brown Comments at 28-29; APACG Comments at 12; E.F. Johnson Comments at 19; Motorola Reply Comments at 2, 15-16. *See also* PCC Comments at 9 (favoring permitting a single call sign to be transmitted by an integrated system, optionally in a digital format, and extending that permission to networked, commonly operated, individually licensed systems).

[406] US West Comments at 9.

[407] *See e.g.*, NABER Comments at 34-35; PageNet Comments at 28-29. *See also* PCIA Comments at 19-20.

[408] RMR Reply Comments at 12. RMR states that this requirement would require a real time clock with a back up battery, whereas currently equipment is set for transmitting an identifier every 15 or 30 minutes.

[409] *See, e.g.*, Celpage Comments at 20.

[410] *Id.*; PageNet Comments at 29. *See also* Motorola Reply Comments at 2, 15-16.

[411] PageNet Comments at 29.

time necessary to reconfigure hardware to comply with any new station identification requirements.[412]

(2) *Discussion*

216. We conclude that CMRS licensees operating on an exclusive basis in Commission-defined service areas should generally be exempt from station identification requirements. Specifically, we will apply this rule to nationwide paging licensees and MTA-based SMR licensees.[413] Commenters generally support our view that such licensees can readily be identified based on service area information contained in the Commission's licensing records and other publicly available sources. Elimination of station identification requirements in such instances also furthers the goal of regulatory symmetry by ensuring that similarly situated CMRS licensees will be treated consistently.

217. We will continue to require station identification in the case of all other CMRS systems, whether they are licensed exclusively on a station-by-station basis or licensed on shared channels. The record indicates that for these systems, call sign transmission continues to be essential for licensee identification because licensees cannot readily be identified by reference to known geographic boundaries. Therefore, identification will be required for SMR (other than MTA-based systems), local 220 MHz, non-nationwide paging, Business Radio, and all non-cellular Public Land Mobile service.

218. Where CMRS licensees remain subject to station identification requirements, we will permit use of a single call sign instead of multiple call signs for commonly owned facilities. This rule is an extension of our recent decision in the *Part 22 Rewrite Order* to allow all Part 22 licensees to use single call signs for multiple-station systems.[414] It will permit more efficient use of air time without compromising the needs of other users or Commission personnel to identify the licensee. We also adopt NABER's proposal that station identification occur on the hour; this will facilitate identification of an interfering signal by providing a defined period for call sign transmission, while reducing additional identification requirements imposed on licensees. Accordingly, CMRS licensees subject to identification requirements will transmit their call signs some time between five minutes before and five minutes after each hour. Should a continuous transmission prevent compliance, the licensee must transmit its identification as soon as the transmission is complete.

219. Finally, we will permit all CMRS licensees on exclusive channels to transmit call signs digitally, as is currently provided in Part 90. Digital call sign transmission will

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[412] *Id.*

[413] We will address identification and other operational requirements for PCS in a proceeding we intend to initiate shortly.

[414] *See* 47 CFR § 22.313(c)(3).

greatly reduce the burden of the call sign requirement for CMRS systems providing digital service. To use a digital call sign, the licensee must provide the Commission with information sufficient to decode the digital transmission and ascertain the call sign transmitted. We will not, however, permit licenses on shared channels to transmit their call signs digitally. Our experience with licensees who experience interference on a shared channel indicates that they would not be able to identify the source of such interference based on a digital call sign transmission.

f. General Licensee Obligations

(1) *Background and Pleadings*

220. Part 22 and Part 90 both contain rules on licensee management and control of station facilities,[415] the retention of station licenses,[416] station inspections,[417] and responses to official communications.[418] On the whole, these rules are quite similar, although minor variations between Part 90 and Part 22 exist. We therefore proposed in the *Further Notice* to retain these rules with minor modifications to eliminate inconsistency and redundancy.[419]

221. Commenting parties agree in principle that general licensee obligations should be conformed. US West and Bell Atlantic, for example, argue generally that these rules should be standardized.[420] Others have particular concern for conforming the rules governing management contracts and station control. Some, including both Part 22 and Part 90 licensees, argue that Part 22 management contract rules should be revised to reflect our current Part 90 rules, as the latter are more flexible.[421] Bell Atlantic argues that because we

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[415] Part 90 licensees are responsible for proper operation of their stations, are expected to provide observations, servicing, and maintenance by certified persons as often as is necessary, and must have and maintain control over their authorized stations. *See* 47 CFR §§ 90.403, 90.433, 90.656. Public land mobile and cellular licensees must exercise effective operational control over the radio facilities and their operation, and are responsible as well for mobiles temporarily associated with their systems *See* 47 CFR §§ 22.305, 22.927.

[416] 47 CFR § 90.437; 47 CFR § 22.303.

[417] 47 CFR § 90.439; 47 CFR § 22.301.

[418] 47 CFR § 90.437; 47 CFR § 22.315.

[419] *Further Notice*, 9 FCC Rcd at 2880-81 (para. 83). In the *Refarming Notice*, we proposed to delete many of these rules in Part 90 on the grounds that they are redundant or unnecessary for most private land mobile licensees. *See Refarming Notice*, Appendix E.

[420] US West Comments at 9; Bell Atlantic Comments at 13.

[421] McCaw Comments at 30-31; NABER Comments at 35; PCIA Comments at 20.

have not imposed operational rules governing control and maintenance of mobile stations on PCS providers, we should eliminate such rules for all CMRS providers.[422]

222. New Par, however, argues that Part 22 management contract rules should apply to reclassified Part 90 providers.[423] Southern opposes New Par's proposal, arguing instead that this issue should be examined more thoroughly in a service-specific context.[424] Southern also recommends incorporating the Part 90 revisions proposed in the *Refarming Notice* into this rule making.[425]

(2) ***Discussion***

(a) Posting of Station Licenses

223. Currently, Part 90 licensees must provide photocopies of station authorizations, including special temporary authorizations, at every control point of the station.[426] In contrast, Part 22 licensees may make available either a photocopy of the authorization at each regularly attended control point of the station, or an address or location where the licensee's current authorization may be found.[427] We adopt the Part 22 approach, which provides licensee flexibility without compromising regulatory and informational requirements.

(b) Station Inspections

224. The Part 22 and Part 90 rules for station inspections are very similar. Both require that a station and its records be available for inspection by an FCC representative at any reasonable hour.[428] Part 90, however, makes explicit that inspections are limited to "authorized" FCC representatives, and limits inspection to a "reasonable request."[429] These requirements are implicit in the Part 22 rules, and for the purpose of clarity, we here also make them explicit in Part 22.

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[422] Bell Atlantic Comments at 6.

[423] New Par Comments at 13-15.

[424] Southern Reply Comments at 9.

[425] Southern Comments at 10.

[426] 47 CFR § 90.437. A "control point" is any place from which a transmitter's functions may be directed. 47 CFR § 90.7.

[427] 47 CFR § 22.303.

[428] 47 CFR § 90.439; 47 CFR § 22.301.

[429] 47 CFR § 90.439.

(c) Official Communications

225. The Commission mails official communications to licensees for a number of reasons, including notifying licensees of rule or statutory violations, apprising licensees of the necessity of completing certain forms, and responding to official surveys. The Part 22 and Part 90 rules governing licensees' responses to these communications have some similar requirements.[430] Part 22 also expressly requires that a licensee promptly respond to official communications other than a notice of rule violation.[431] For the sake of conformity, we extend this approach to Part 90 licensees. We also provide, for all Part 90 and Part 22 licensees, that for official communications other than a notice of a rule or statutory violation, the licensee must respond within the time limit specified in the correspondence.

(d) Station Management and Control

226. We agree with commenters that the rules regarding station management and control should be conformed to ensure consistent treatment of all CMRS providers. We also note that the existing rules are already highly similar,[432] as they stem from the prohibition in Section 310(d) of the Communications Act against unauthorized transfers of control by all Commission licensees.[433] To promote regulatory consistency, we will extend the language of the current Part 22 rule to all CMRS providers. As some commenters note, however, our interpretation of these rules has varied in the context of specific common carrier and private radio services, particularly on the issue of management contracts.[434] We believe the

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[430] Part 22 and Part 90 both require that persons receiving official notice of violation of a rule, statute, international agreement, Executive Order, or regulation must respond within 10 days; that if such a response cannot be made within 10 days, the licensee must acknowledge receipt of the letter and explain its reasons for the delay; and that responses must be complete and self-contained without reference to other communications. 47 CFR § 90.449; 47 CFR § 22.315.

[431] 47 CFR § 22.315.

[432] 47 CFR § 90.403; 47 CFR § 22.305. Part 22 (for cellular licensees) and Part 90 (for SMR licensees) also require that a licensee exercise effective operational control over mobile stations with which it communicates. 47 CFR § 90.656; 47 CFR § 22.927.

[433] *See* Lorain Journal Co. v. F.C.C., 351 F.2d 824, 828 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966) (*Lorain Journal*) (Section 310(d) the statutory basis for Commission's rules on station control); Telephone and Data Systems, Inc. v. F.C.C., 19 F.3d 42, 46 (1994) (applying *Lorain Journal* to Part 22 licensees); Applications of Motorola, Inc., File No. 507505, Order, para. 14 (July 30, 1985), announced by FCC News Release No. 6440 (Aug. 15, 1985) (applying *Lorain Journal* to Part 90 licensees).

[434] *Compare* Intermountain Microwave, 24 Rad. Reg. 983 (1963) (six-prong test of control for common carrier services) *and* Applications of Motorola, Inc., File No. 507505, Order, para. 14 (July

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application of our station control rules to management contracts in specific services should be explored further. In our *Second Further Notice* in this docket, we have sought comment on whether certain types of CMRS management contracts should be considered attributable interests for spectrum cap purposes even if they do not cause the manager to have *de facto* control of the facilities. In that proceeding, we will also address whether our interpretation of the rules regarding CMRS management contracts should be further conformed or modified.

g. Equal Employment Opportunities

(1) *Background and Pleadings*

227. In the *Further Notice*, we sought comment on extending our existing equal employment opportunity (EEO) rules, which are currently applicable to all Public Mobile Service licensees under Part 22, to all CMRS providers.[435] The *Further Notice* also asked whether the current exemption from EEO filing requirements for licensees with fewer than 16 employees provided sufficient flexibility for small business licensees that would be newly subject to EEO rules.[436]

228. Nearly all commenting parties who expressly address our proposal agree in principle that EEO requirements currently applicable to common carriers should extend to all CMRS providers.[437] Comments varied, however, regarding whether the exemption from filing requirements for licensees with fewer than 16 employees will provide sufficient flexibility for reclassified Part 90 licensees. NABER, for example, recommends increasing the minimum number of employees allowed under the small business exemption to 25 on the grounds that many small SMR providers who employ more than 16 persons will encounter undue record keeping and reporting costs.[438] PCIA also recommends that the 16-employee benchmark be revisited.[439] Celpage, Metrocall, and RAM Tech, while supporting the 16-employee standard, recommend an ''amnesty period'' following adoption of the rules to

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[434](...continued)
30, 1985), announced by FCC News Release No. 6440 (Aug. 15, 1985) (test of control for SMR services).

[435] *Further Notice*, 9 FCC Rcd at 2881 (para. 85).

[436] *Id.*

[437] *See, e.g.*, Bell Atlantic Comments at 13; BellSouth Comments at 20; NABER Comments at 36; Nextel Comments at 43; Celpage Comments at 20-21.

[438] NABER Comments at 35-36.

[439] PCIA Comments at 20-21.

allow reclassified Part 90 licensees sufficient time to file EEO reports and to otherwise adapt to the new requirements.[440]

229. Other commenters do not believe that the number of licensees covered by the small business exemption should be expanded. New Par suggests there is no need to distinguish between small business Part 22 and Part 90 licensees. New Par also argues that private land mobile licensees who will continue to be regulated as private service providers until August 10, 1996 will have sufficient time to implement procedures to comply with EEO rules.[441] RMD suggests that the policy goals of the EEO rules arise from being a recipient of federal licensing benefits rather than from the regulatory classification of a particular entity. Accordingly, RMD suggests that consideration be given to applying EEO requirements to all land mobile licensees whether they are classified as CMRS or PMRS.[442]

230. Finally, Dial Page proposes that instead of extending EEO requirements to all CMRS, we eliminate their applicability to common carriers. Dial Page argues that the rationale for imposing EEO requirements on broadcast and cable -- *i.e.*, to promote diversity in programming -- does not apply to common carriers.[443] Dial Page also contends that requiring common carriers to file EEO reports with the Commission serves no useful purpose and that EEO enforcement should instead be left to the EEOC and applicable state and local human rights commissions.[444]

(2) *Discussion*

231. We agree with most of the commenters that we should have EEO rules for all CMRS providers. We believe that EEO rules for CMRS providers will further the statutory purpose embodied in section 309(j) of the Communications Act regarding minorities and women. Specifically, section 309(j)(4)(D) provides that the Commission should "ensure that . . . businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services . . . ."[445] Although Congress enacted this statutory provision in the context of the Commission's implementation of its new competitive bidding authority, the provision also reflects a broad congressional mandate that

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[440] *See, e.g.*, Celpage Comments at 20-21; Metrocall Comments at 20; Network Comments at 20; RAM Tech Comments at 19-20.

[441] New Par Comments at 15.

[442] RMD Comments at 11.

[443] Dial Page Reply Comments at 9 (*citing* NAACP v. FPC, 425 U.S. 662, 670 n.7 (1976)).

[444] *Id.* at 9-10.

[445] 47 U.S.C. § 309(j)(4)(D).

properly may be implemented through our broad authority under sections 4(i) and 303(r) of the Act to adopt such rules as may be necessary to carry out the Act's provisions.[446]

232. EEO rules for CMRS providers are appropriate and necessary to achieve the statutory goal of increased ownership opportunities for minorities and women in spectrum-based services. By having EEO rules that apply to all CMRS providers, we will provide increased communications experience for minorities and women. This experience will, in turn, enable them more easily to become owners of communications enterprises.

233. In implementing section 309(j) in the CMRS context (narrowband PCS), we have already recognized the important role that employment opportunities for minorities and women can play in expanding ownership opportunities for these groups: In the *Third Report and Order* in our competitive bidding proceeding, we stated that "our EEO rules enhance access by minorities and women to increased employment opportunities, which are the foundation for increasing opportunities for minorities and women in all facets of the communications industry, including participation in ownership."[447] Congress has also recognized the relationship between EEO rules and increasing ownership opportunities for minorities and women: "the Committee recognizes that a strong EEO policy is necessary to assure sufficient numbers of minorities and women gain professional and management level experience . . . , and thus that significant numbers of minorities and women obtain the background and training to take advantage of existing and future . . . ownership opportunities."[448]

234. Because our CMRS rules further an explicit statutory objective contained in the Communications Act, our authority to adopt them is not constrained by the Supreme Court's decision in *NAACP v. FPC*.[449] In that case, the Court held that the Federal Power Commission had no authority to adopt EEO rules for its regulatees based on its broad

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[446] 47 U.S.C. §§ 154(i), 303(r).

[447] Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No 93-253 Third Report and Order, FCC 94-98, at 31 n.41 (released May 10, 1994) (quoting Implementation of the Commission's Equal Opportunity Rules, MM Docket No. 94-34, Notice of Inquiry, 9 FCC Rcd 2047 (1994)). *See also* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No 93-253, Fourth Report and Order, 9 FCC Rcd 2330, 2337 n.67 (1994)(same quotation in the context of the Interactive Video Data Service); Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules, Policy Statement, 9 FCC Rcd 929, 929-30 (1994), *petitions for recon. pending* ("EEO rules enhance access by minorities and women to increased employment opportunities. Increased employment opportunities are the foundation for increasing opportunities for minorities and women in all facets of the communications industry, including participation in ownership.").

[448] H.R. Rep. No. 628, 102d Cong., 2d Sess. 114 (1992) (discussing broadcast EEO rules).

[449] NAACP v. FPC, 425 U.S. 662 (1976).

"public interest" authority where EEO rules did not further the purposes of the underlying statutes.[450] Here, in contrast, our EEO rules further the statutory purpose set forth in section 309(j) of the Communications Act and are thus fully consistent with the *NAACP* decision. Indeed, our authority to adopt EEO rules for CMRS licensees to further the statutory objective of ensuring increased ownership opportunities for minorities and women is analogous to our authority to adopt broadcast EEO rules to further the statutory goal of viewpoint diversity, which the Supreme Court explicitly upheld in *NAACP*.[451]

235. We also conclude that we should retain the exemption from EEO filing requirements for licensees with fewer than 16 employees. We agree with Celpage and other commenting parties that the 16-employee benchmark sufficiently eases paperwork burdens for small businesses.[452] We also find no evidence in the record that Part 22 licensees who do not qualify for the exemption have faced an inordinate paperwork burden from being required to file EEO reports. We therefore decline to expand the scope of the exemption beyond its current level. Finally, we note that even for those smaller licensees not exempt from filing requirements, Part 22 rules provide us discretion in accounting for a licensee's size and location in determining whether its EEO program satisfies Commission rules.[453]

236. We also do not adopt RMD's suggestion to apply EEO requirements to licensees other than CMRS providers. Our purpose here is not to eliminate regulatory differences between commercial and noncommercial services, but is to eliminate regulatory inconsistencies between reclassified Part 90 services and substantially similar common carrier services. Consequently, RMD's proposal is beyond the scope of this proceeding.

237. Finally, we conclude that no special "amnesty period" for reclassified Part 90 licensees to comply with these rules is necessary. The Budget Act already provides for a transition period for grandfathered Part 90 licensees until August 10, 1996,[454] which we will apply to the EEO requirements adopted for CMRS providers in this Order. Consequently, these licensees have two years from the date of this order to come into compliance with our EEO rules, and such licensees will not be required to file their initial EEO reports until May

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[450] *Id.* at 669-70.

[451] *Id.* at 670 n.7.

[452] *See, e.g.*, Celpage Comments at 20.

[453] The rules expressly provide that a program reasonably take steps to assure nondiscrimination to the extent appropriate in terms of a licensee's size and location. *See* 47 CFR § 22.321(a)(2); Rule Making To Require Communications Common Carriers To Show Nondiscrimination in Their Employment Practices, Docket No. 18742, Report and Order, 24 FCC 2d 725, 729 (para. 10) (1970).

[454] Specifically, licensees providing private land mobile services as of August 10, 1993, and paging services utilizing frequencies allocated as of January 1, 1993 for private land mobile services will be regulated as PMRS until August 10, 1996. Budget Act, § 6002(c)(2)(B).

31, 1997. Even for new licensees not entitled to the two-year transition period, we believe that there is sufficient time to come into compliance with these requirements by the time the rules become effective. The initial EEO filing requirement for non-grandfathered licensees is not due until May 31, 1995. In addition, in evaluating a licensee's or permittee's compliance with EEO requirements, we will apply the rules prospectively only, taking into account the amount of time the licensee has been subject to the new rules.[455] We believe that these factors will afford licensees ample time and flexibility to conform to these requirements.

D. SPECTRUM AGGREGATION LIMIT

1. *Spectrum Caps Generally*

a. Background and Pleadings

238. In this Order, we are capping at 45 MHz the total amount of combined PCS, cellular, and SMR spectrum classified as CMRS in which an entity may have an attributable interest in any geographic area at any point in time. We are adopting this cap as a minimally intrusive means of ensuring that the mobile communications marketplace remains competitive and retains incentives for efficiency and innovation. This cap applies only to PCS, SMR, and cellular uses meeting the definition of CMRS. Because the public interest considerations embodied by this cap may apply to PCS, SMR, and cellular uses meeting the definition of PMRS, we will seek comment in the near future on a proposal to broaden the cap we are adopting today to include such uses.

239. In the *Further Notice*, the Commission directed attention to a possible gap in our current rules limiting aggregation of wireless spectrum, the basic resource needed and used by all wireless service providers. Such restrictions seek to promote diversity and competition in mobile services, by recognizing the possibility that mobile service licensees might exert undue market power or inhibit market entry by other service providers if permitted to aggregate large amounts of spectrum. Thus, in other proceedings we set limits on the aggregation of broadband spectrum that will be used for specific CMRS services: 40 MHz of PCS spectrum (10 MHz for in-region cellular providers for 5 years and 15 MHz thereafter) and 25 MHz of cellular spectrum in any geographic area.[456] Licensees are effectively limited to a total of 300 kHz of narrowband PCS spectrum in any area.[457]

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[455] *See generally* Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992 -- Equal Employment Opportunities, MM Docket No. 92-261, Report and Order, 8 FCC Rcd 5389, 5399 (para. 49 n.155) (1993) (codified at 47 CFR §§ 76.71-76.79).

[456] *Broadband PCS Reconsideration Order*, at para. 67; 47 CFR § 22.942.

[457] The specific limitation is a maximum of three 50 kHz channels, paired or unpaired (*i.e.*, no more than 150 kHz paired with 150 kHz). *Narrowband PCS Order*, 8 FCC Rcd at 7168 (para. 34).

240. The Commission has not adopted a general cap on the amount of spectrum that an entity may use to provide CMRS. As the *Further Notice* explained, however, an overall CMRS spectrum cap might be justified, given the flexible regulatory environment we have created for CMRS that facilitates competition among holders of different types of licenses.[458] We were concerned that excessive aggregation by any one or several CMRS licensees could reduce competition by precluding entry by other service providers and might thus confer excessive market power on incumbents. The *Further Notice* sought to balance concern for the number of competitors against the benefits of economies of scale and scope.

241. To address these concerns, the *Further Notice* tentatively concluded that if we decide that some form of cap should be established, then the cap should be comparable to our existing limits on broadband PCS and PCS-cellular aggregation.[459] The *Further Notice* proposed a 40 MHz limit on CMRS spectrum in a geographic area applied to all CMRS services. We sought comment on whether this limit should be adjusted upward slightly to allow reasonable flexibility for existing mobile service providers to provide both broadband and narrowband services.[460] We also requested comment on various subsidiary spectrum cap issues, including the spectrum and services that should be included under a cap,[461] the geographic service area to be encompassed in setting a cap,[462] and standards for attribution of ownership interests in CMRS for purposes of determining how the cap would apply to a given entity.[463]

242. A majority of the commenters oppose a general CMRS spectrum cap, at least at this time. Of the 40 commenters addressing the issue, 29 oppose adopting a spectrum cap.[464]

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[458] *Further Notice*, 9 FCC Rcd at 2882 (para. 89).

[459] *Id.* (para. 92).

[460] *Id.* at 2883 (para. 93).

[461] *Id.* at 2883-84 (paras. 94-98).

[462] *Id.* at 2884 (paras. 99-100).

[463] *Id.* (paras. 101-102).

[464] *See, e.g.*, AirTouch Comments at 7; AMTA Comments at 28-30; Bell Atlantic Comments at 8-9; BellSouth Comments at 2; CellCall Reply Comments at 12; CTIA Comments at 3; Century Comments at 2-4; Comcast Comments at 2-3; Constellation Comments at 2-4; Dial Page Comments at 2-4; GTE Comments at 18-21; LQP Comments at 2-6; McCaw Comments at 5; Motorola Comments at 2-3; NTCA Reply Comments at 2; Nextel Comments at iii; NYNEX Comments at 4; OneComm Comments at 8; Pacific Reply Comments at 2; Pagemart Comments at 3-5, 10; PageNet Comments at 47-48; PCIA Comments at 7-9; Pittencrieff Comments at 15-16; PRTC Reply Comments at 1-3; Radiofone Reply Comments at 1; RMD Comments at 14; Roseville Comments at

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On the other hand, a large number of those who oppose the general CMRS cap support a cap that treats SMR operators similarly to cellular and PCS licensees.[465]

243. The most extensive discussion and analysis was submitted by AirTouch, which argues that the competitive concerns raised in the *Further Notice* are not applicable to the CMRS industry.[466] AirTouch suggests that the actual impact of spectrum caps is likely to be contrary to Commission goals: incumbent firms may be precluded from taking advantage of their expertise and pursuing promising opportunities if their entry into new services would require more spectrum than the cap would allow.[467] They also claim imposing rigid firm-size limits and reserving CMRS "space" for inefficient or non-innovative providers is counterproductive and even anticompetitive.[468] In any event, AirTouch contends, the preferred approach to anticompetitive concerns is to review all acquisitions and transfers of spectrum on a case-by-case basis, not to prejudge the competitive effects of all spectrum aggregations on the basis of a single factor.[469]

244. AirTouch has submitted two economic studies in support of its views, one by Professor Jerry Hausman, and a second by Professor R. Preston McAfee and Dr. Michael A. Williams. Both conclude that the proposed overall CMRS spectrum cap is likely to harm consumers by penalizing low-cost, efficient providers of wireless services and harming providers of innovative wireless service.[470] Both also conclude that it would be appropriate to include SMR providers in a cap because they claim that cellular, PCS and SMR are in the same relevant market and cellular and PCS are already subject to caps.

245. The Hausman study discounts concerns of anticompetitive behavior on the grounds that the unilateral exercise of market power is unlikely in CMRS. According to Hausman, CMRS is characterized by large fixed costs and small marginal costs that, combined with spectrum expansion technology, permit firms to increase their supply

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[464](...continued)
3-4; Southwestern Bell Comments at 4-9; TRW Comments at 1-2. Identical comments opposing spectrum caps were filed by Celpage, Metrocall, Network, and RAM Tech.

[465] *See, e.g.*, AirTouch Comments at 7; APC Comments at 2; Bell Atlantic Comments at 10; McCaw Comments at 18; New Par Comments at 17; NYNEX Comments at 6; RMR Comments at 14; Sprint Comments at 3.

[466] AirTouch Comments at 6.

[467] *Id.* at 9-10.

[468] *Id.* at 15.

[469] *Id.* at 13.

[470] *Id.*, Attachment I (Hausman) at 10-12; Attachment II (McAfee, Williams) at 11.

profitably if a competitor attempts to limit its output.[471] Hausman points to the evidence of market entry by wide-area SMRs and potential PCS entrants to demonstrate that foreclosure will not occur in CMRS markets.[472]

246. The McAfee-Williams study points out that the proposed 40 MHz cap results in a maximum possible share of only 23 percent of a relevant market defined to include cellular and broadband PCS, and even smaller shares under broader market definitions, including, for example, wide-area SMR.[473] The study states that it is not unusual for the leading firm in an industry to have a market share above 23 percent and that antitrust agencies in recent years have approved many transactions when the proposed merger would create a firm with a share in excess of 23 percent.[474] In the authors' view, "there is no basis for making telecommunications uniquely subject to a market share *per se* rule to block spectrum aggregation."[475]

247. Many of the other comments also suggest that we follow a case-by-case approach to assessing the extent of spectrum aggregation that will be permitted, either in the case of spectrum licensing or in considering acquisitions or mergers of licensees.[476] They claim this approach would be more consistent with the approach applied generally to firms in the economy under the antitrust laws. The *1992 Merger Guidelines* set varying levels of scrutiny for mergers and acquisitions based on the level of concentration in the relevant market, but do not fix absolute limits on the size or market share of the merged company. In this regard, it is worth noting that the *Merger Guidelines* define a market with four firms each having 23 percent share as "highly concentrated."[477] In addition to market shares, the Guidelines

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[471] *Id.*, Hausman at 8.

[472] *Id.*, Hausman at 9.

[473] *Id.*, McAfee, Williams at 7-8. It is worth noting that the 23 percent share is of an input, the spectrum, rather than a measure of output (*e.g.*, service revenues). The latter is the standard way to measure market share. A firm could potentially have a revenue market share greater than 23 percent by using its spectrum more intensively than its rivals.

[474] *Id.*, McAfee, Williams at 8.

[475] *Id.*

[476] *See, e.g.*, BellSouth Comments at 11.

[477] The HHI would be above 2100 and the Guidelines say that an industry with an HHI above 1800 is considered highly concentrated. *See 1992 Merger Guidelines* at § 1.51(c), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20,573-6.

permit consideration of other factors that pertain to competitive effects on a case-by-case basis.[478]

b. Discussion

248. Notwithstanding the objections contained in the comments, we believe that a broad based spectrum cap is called for. By instituting a cap that allows for what we and the majority of industry commenters in our PCS proceeding view as significant aggregation, we can add certainty to the marketplace without sacrificing the benefits of pro-competitive and efficiency-enhancing aggregation. We previously instituted spectrum caps for specific CMRS services[479] and have now proposed a more general aggregation limit to promote competition and prevent the exercise of market power. If firms were to aggregate sufficient amounts of spectrum, it is possible that they could unilaterally or in combination exclude efficient competitors, reduce the quantity of service available to the public, and increase prices to the detriment of consumers. We believe that the imposition of a cap on the amount of spectrum a single entity can control in an area will limit the ability to increase prices artificially. The lack of a spectrum cap could undermine other goals of the Budget Act, such as the avoidance of excessive concentration of licenses and the dissemination of licenses among a wide variety of applicants.

249. We disagree with AirTouch's assertion that we are reserving space for inefficient providers. A spectrum cap will not limit the market share that can be obtained by any single firm. Market forces will determine the market share of each firm with the more efficient firms acquiring higher market shares. Moreover, a broad spectrum cap does not diminish the incentives to develop innovations that use spectrum more efficiently. Indeed, an innovation that increases spectrum efficiency will allow a firm to raise its share of traffic without having to increase its share of the spectrum utilized to carry that traffic.

250. A cap is a bright line test that provides entities who are making acquisitions with greater assurance than a case-by-case approach that if they fall under the cap, the Commission will approve the acquisition. The cap is particularly useful to entities

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[478] Other things being equal, market concentration affects the likelihood that one firm, or a small group of firms, could successfully exercise market power . . . . However, market share and concentration data provide only the starting point for analyzing the competitive impact of a merger. Before determining whether to challenge a merger, the Agency also will assess the other market factors that pertain to competitive effects, as well as entry, efficiencies and failure.

Id. at § 2.0, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20,573-6.

[479] The maximum amount of cellular spectrum is 25 MHz (1 license) and the maximum amount of PCS spectrum an entity may hold is 40 MHz. We have also restricted entities to holding three narrowband PCS licenses.

formulating strategies and lining up financing in anticipation of the broadband PCS auctions. The bright line test also eases the administrative burden on the Commission.

251. Our goal in setting a cap is to discourage anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency. The objections to a cap advanced in the comments do not quarrel with this goal. Rather, the commenters express concern that the caps will be set too low or will cover too many services, with the result that carriers will be barred from taking advantage of efficiencies that additional spectrum would offer. If a cap is set high enough, or only restricts acquisitions in limited segments of the spectrum, the risk of efficiency losses will be reduced. We think that the imposition of a properly designed cap will not cause the harm to competition alleged by the commenters. Indeed, in some contexts, commenters agree with us because, while objecting to an overall cap, some state that existing caps should be broadened to include SMR licensees. As discussed above, we think that setting a cap furthers the public interest by promoting competition in CMRS services, allowing review of CMRS acquisitions in an administratively simple manner, and lending certainty to the marketplace.

2. *Scope of Spectrum Cap*

a. Background and Pleadings

252. Having determined that spectrum caps can be on balance beneficial, we need to determine which radio services belong under a more general spectrum cap. Earlier in this Report and Order, we determined that all CMRS services should be considered as currently or potentially competing with one another. We examined in the "substantially similar services" section which services would or could compete with each other now and in the future so that we could develop a consistent regulatory system that would not impede competition. In this section, our concerns are somewhat different. Here, our focus on the ability of a single competitor or group of competitors to control sufficient spectrum so that they could reduce the amount of service available to the public and increase prices for a service or group of services encompassed by CMRS. Using a frame of reference fully consistent with that of our earlier analysis, we conclude that, although CMRS contains many radio services, a cap limited to a subset of services with significant (more than 5 MHz[480])

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[480] Although a broadband mobile telecommunications provider is always capable of offering narrowband services, and narrowband service providers can provide some competition to broadband service providers, a large amount of spectrum is beneficial for providing mobile telephone service. Based on the evidence presented in the PCS proceeding, we believe that a cellular carrier or PCS provider would have a cost advantage over a licensee with significantly less than 5 MHz of spectrum. *See, e.g.*, FCC, Transcripts of PCS Public Forum, Apr. 11-12, 1994, at 439 (statement of M. Roberts). *See also Broadband PCS Order*, 8 FCC Rcd at 7724 (para. 55). On the other hand, we also believe that a licensee with 10 MHz of unencumbered spectrum should be capable of offering services comparable to those now provided by cellular systems. *See Broadband PCS Reconsideration Order* at

(continued...)

bandwidth will achieve the same goals as an overall cap, will not unreasonably distort acquisition or competitive decisions, will help promote competitive parity, and will ease administrative burdens.

253. Many commenters chose to frame their discussion of the "scope of the cap" in terms of a narrow relevant market analysis. For example, in AirTouch's view, CMRS services like paging and satellite services do not compete with broadband services and thus CMRS does not constitute a single relevant market.[481] Moreover, they argue the demand characteristics and supply factors that will determine which CMRS services will compete with each other are not known. They claim the imposition of global limits over ownership of all CMRS spectrum would be without basis. AirTouch asserts such limits would dictate the number and size of providers for all CMRS services before it becomes clear how factors such as economies of scale and scope will relate to efficiency and incentives to innovate and would be short-sighted, risky, and unwarranted.[482]

254. Commenters generally contend that broadband services -- cellular, PCS, and wide-area SMR -- will compete with one another, but argue that narrowband paging and PCS services are not likely to be in the same market as broadband CMRS services.[483] The commenters supporting a spectrum cap argue that such a cap would recognize that SMRs will compete with cellular. APC supports a spectrum cap of 40 MHz of cellular, PCS, or SMR spectrum in any geographic area, which it says would make "the valuable recognition that ESMR [wide-area SMR] carriers will compete effectively with both cellular and PCS."[484] New Par similarly argues that "[a] CMRS spectrum cap is necessary to achieve regulatory parity in light of the Commission's decision to impose spectrum aggregation limits on PCS and PCS-cellular aggregation."[485] It proposes a 35 MHz cap, the same limit currently set for cellular carriers, that would include all types of cellular-like service, including two-way 220-222 MHz operators, Part 90 licensees, and SMR providers. Sprint says it is not clear that

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[480](...continued)
para. 60. *See also* Petition for Reconsideration of CTIA, *Broadband PCS Order*, at 3; Petition for Reconsideration of Nextel, *Broadband PCS Order*, at 5-8.

[481] AirTouch Comments, Hausman at 6. Professor Hausman asserts that cellular and paging are in different product markets, because a price increase in one service would not cause enough customers to shift to the other service to defeat the price increase. He also asserts that other CMRS services are in separate markets.

[482] *Id.* at 8-9.

[483] *See, e.g.*, APC Comments at 3; Comcast Comments at 4-6; Nextel Comments at 28; PageNet Comments at 48.

[484] APC Comments at 2.

[485] New Par Comments at 15.

there should be one cap, but that any cap should apply to services that are substantially similar to one another, including cellular, broadband PCS, and wide-area SMR.[486]

255. McCaw says that considerations of regulatory parity and a "level playing field" dictate that SMR operators be subject to the same limits applied to cellular licensees seeking PCS licenses, to ensure that no entity gains a competitive advantage merely by finding a loophole that can be used to the competitive detriment of others.[487]

256. E.F. Johnson also strongly favors the cap, both to accord similar treatment to services that are substantially similar and to foster ownership opportunities for small, local providers.[488] Rural Cellular requests that any cap that is adopted should not apply to rural telephone companies. Because rural companies are the only likely providers of CMRS services in rural areas, RCA reasons that a cap might effectively deprive rural areas of essential radio-based services.[489]

257. In contrast, Nextel says that wide-area SMRs at present serve fewer than 5,000 customers and are too new and too small to have the capability of behaving anticompetitively.[490] They claim the number of prospective providers will assure that licensees will service all possible markets and market niches. Under these circumstances, Nextel contends, a general spectrum cap for other than cellular carriers is not justifiable on

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[486] Sprint Comments at 2.

[487] McCaw Comments at 18. *Accord* Southwestern Bell Comments at 17 ("to facilitate regulatory parity the FCC should impose the same eligibility rules on [SMR] providers which seek PCS licenses as those rules imposed on cellular providers."); AirTouch Comments at 16 ("[SMRs] compete directly with cellular service and must, as a matter of equitable regulation, be included in any caps that are applicable to cellular providers.").

[488] E.F. Johnson Comments at 19. Two commenters propose limits on the number of channels that wide-area SMRs may accumulate. Southern proposes that the Commission limit frequencies to the number needed for realizing scale economies. It submits a study that concludes that, in a large metropolitan area, digital cellular economies are not significant above 140 channels, about half of those available. Southern Comments at 14-17 and Attachment. Brown supports limiting the number of channels any wide-area SMR may hold to the number which will permit three systems in the market along with room for growth by other currently authorized SMR systems. Brown Comments at 16-19. These proposals represent requests for revising rules and policies for wide-area SMRs that we consider beyond the scope of this proceeding.

[489] Rural Cellular Comments at 5. As we have stated in the *Broadband PCS Reconsideration Order*, we do not believe that we need to make an exception to the spectrum cap for rural areas. If demand requires more spectrum than the caps, we feel that customers will be better served through competition than by a single provider. *Broadband PCS Reconsideration Order*, at para. 66.

[490] Nextel Comments at 27.

any empirically-demonstrable economic or antitrust basis.[491] It describes the cap as "an unwarranted sledgehammer approach to constrain nonexistent market power."[492]

b. Discussion

258. We believe that our goal of preventing anticompetitive outcomes can be accomplished by creating a cap on PCS, SMR and cellular licensees. The purpose of the cap is to prevent licensees from artificially withholding capacity from the market. The aggregation of spectrum measures the ability to withhold capacity from the market. PCS, cellular and SMR account for 189 MHz of the approximately 205 MHz of spectrum available for terrestrial CMRS.[493] In most of the other services, the ability to aggregate spectrum is limited, so that capping the aggregation within cellular, SMR and PCS will be sufficient to prevent excessive aggregation.

259. Clearly, broadband PCS and cellular belong in any broad spectrum cap. These are the two mobile radio services with the most spectrum, totalling 170 MHz. There is already a cap on the amount of PCS spectrum that a cellular licensee may hold. Without a spectrum cap, entities in these two radio services have the potential to limit entry by other broadband service providers. The third radio service that has this potential is the SMR Service.

260. The effect of permitting unlimited aggregation of SMR and PCS spectrum could be an increase in the concentration of spectrum available for cellular-type services and a reduction in the number of potential providers, thus diminishing opportunity for more diverse ownership of mobile wireless spectrum.[494] This could undermine other goals of the Budget Act, such as the avoidance of excessive concentration of licenses and the dissemination of licenses among a wide variety of applicants.[495] It might also tend to reduce the incentives of SMR operators to act vigorously to make efficient use of both their SMR and PCS spectrum allocations.

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[491] Nextel Comments at 26-27.

[492] *Id.* at 28.

[493] In addition to PCS, cellular, and SMR, excluding air-to-ground, there are 4.6 MHz of spectrum for non-cellular terrestrial Part 22 CMRS services, and 9.88 MHz of CMRS spectrum under Part 90. *See Further Notice*, 9 FCC Rcd at 2881 (para. 86 nn. 165 & 166).

[494] Once again, it is important to note that the Commission is not predetermining the market share outcomes. A cap is merely a means for the Commission to set the stage to maximize competition.

[495] *See* Conference Report at 482.

261. We reject arguments for not including SMR spectrum within the cap. While current SMRs may at present have low market penetration, the SMR technology holds the potential to permit SMR operators to offer services that are nearly identical to those offered by both cellular and broadband PCS. An entity controlling both SMR and PCS spectrum might use all their spectrum to take advantage of economies of scale and scope, which would be in the public interest. It is also possible, however, that they might seek to accumulate spectrum in order to limit entry by other providers and gain a headstart over their cellular competitors and other new entrants moving into PCS.

262. We also are unconvinced that the current small market presence of SMR operators, relative to cellular carriers, warrants preferential treatment. In the first place, it is far from certain that SMRs will remain small. As discussed in the prior section defining substantially similar services, we are instituting forward-looking regulations. The 19 MHz allocated to SMRs is a substantial amount of spectrum. While SMR companies have a relatively small market presence compared to cellular carriers, they may become more important players in the future.[496] In addition, while SMRs currently may not have as advantageous a market position as cellular carriers who have established systems and a base of customers, in the absence of any restrictions on their aggregation of broadband spectrum SMRs would enjoy a unique advantage in relation to all other potential bidders. They would be the only entities with the opportunity to accumulate more than 45 MHz of broadband spectrum. They would in fact be in a more favorable position in this important respect than the designated entities, who were awarded an express statutory preference in bidding for PCS spectrum. Adopting consistent restrictions on spectrum aggregation for PCS, cellular, and SMR will help establish a level playing field for participants in our competitive bidding proceedings, and help give free play to market forces.

263. We are therefore instituting a 45 MHz aggregate spectrum cap on CMRS uses within three radio services: broadband PCS, cellular and SMR. This cap supplements the caps adopted for cellular service and for PCS (*i.e.*, those caps may not be exceeded either).[497] As a result, an entity can hold up to 45 MHz of spectrum in the three services in any geographic area. For example, an entity can hold a cellular license accounting for 25 MHz, a 10 MHz PCS license and 10 MHz worth of SMR spectrum in the same area. Although we recognize that our service specific limits of 40 MHz for PCS and cellular are lower, we conclude that 45 MHz is an appropriate overall limit for several reasons: this restriction will allow small SMR operators (those with less than 5 MHz) to acquire both a 30 MHz and a 10 MHz PCS license in the same area. In addition, it will prevent excessive concentration of licenses by a single carrier, but it will enable PCS and cellular operators

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[496] L. Runyon & S. Birch, SMR IN THE UNITED STATES: A WINDOW OF OPPORTUNITY 7-8 (Oct. 1993)(Merrill Lynch publication); "Nextel To Buy Wireless Competitor," Washington Post, Aug. 6, 1994, at D1.

[497] *Broadband PCS Reconsideration Order*, at paras. 66-68.

with 40 MHz of spectrum to obtain additional spectrum so they have incentives to offer other services to take advantage of new innovation or economies of scale and scope.

264. The 45 MHz cap in conjunction with our service specific limits for PCS and cellular will help ensure diversity in the provision of high capacity, wide-area land mobile radio service. These restrictions should generally ensure the opportunity for three new PCS providers in every major market in addition to the current providers.[498] In addition, we will continue to have a large number of providers of other CMRS services including paging, narrowband PCS and various Part 90 radio services. Furthermore, this action is consistent with the intent of Congress insofar as it establishes effective parity in the eligibility requirements for cellular and wide-area SMRs for PCS spectrum. This cap, for the most part, does not limit the number of additional SMR channels an SMR operator might acquire, nor exclude them from participation in PCS (although it might limit them to a 30 MHz license). Thus, the fears of some SMR operators commenting in this proceeding[499] concerning lost efficiency from inclusion in a spectrum cap are unfounded.

265. Finally, we are not adopting a different cap for rural service providers. We conclude that the demand characteristics in those areas do not present any need for aggregation beyond the limits we have set. If, as some petitioners have stated, demand in these rural areas will require more spectrum, the public interest will be better served by having additional competitive service providers. Petitioners have not shown that the economies of scale and scope are so different in rural areas that they justify an exception that allows a single provider to acquire a large amount of spectrum.

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[498] There should be a minimum of three PCS providers in each area, since we have adopted a service specific limit of 40 MHz and have allocated 120 MHz of PCS spectrum. Even if an incumbent SMR provider buys one of the 30 MHz licenses, there will still be a minimum of three new providers in the market.

[499] *See* OneComm Reply Comments at 13-14; Comcast Reply Comments at 6-7.

3. *Services Excluded from Cap*

a. Narrowband Radio Services

(1) *Pleadings*

266. New Par would exclude narrowband PCS and paging from the cap, because New Par does not anticipate that these services will compete with one another.[500] AirTouch also agrees that paging services should not be included in the cap.[501] Others also agree that narrowband paging and PCS services are not likely to be in the same market as broadband CMRS services.[502]

(2) *Discussion*

267. We have decided to exclude all terrestrial narrowband radio services from the cap. These services total less than 10 percent of the 189 MHz covered by our terrestrial broadband spectrum cap. Channels in the largest block of the narrowband services, business radio in the 450-470 MHz band, are shared in each geographic market by many licensees. Of the approximately 10 MHz of spectrum for narrowband terrestrial services where we have provisions for channel exclusivity, it is highly unlikely that one entity could ever accumulate as much as 5 MHz in any given geographic market. In addition to factors such as the cost of obtaining dozens of licenses per geographic market, there already are regulatory safeguards, including intra-service caps for most of these services. Thus, there is little risk that an entity could use narrowband allocations to exert undue market power over CMRS as a whole. In addition, the services provided by the narrowband radio service licensees can, for the most part, be provided by the licensees subject to the cap.

b. Satellite Services

(1) *Pleadings*

268. Commenters addressing satellite service assert that it is more likely to be complementary to, not competitive with, broadband service because it will offer ubiquitous, albeit more expensive, service.[503] They contend it would be premature to adopt spectrum aggregation rules for satellite while issues of how much spectrum should be awarded and

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[500] New Par Comments at 16.

[501] AirTouch Comments at 7-8.

[502] *See, e.g.*, APC Comments at 3; Comcast Comments at 4-6; Nextel Comments at 28; PageNet Comments at 48.

[503] *See* Comsat Reply Comments at 2-3.

how it should be divided are pending.[504] They also point out Mobile Satellite Service (MSS) providers typically share spectrum with other service providers.[505] AMSC states that the nature of satellite systems does not permit the same frequency reuse as is possible with a terrestrial system.[506] Thus, a MHz of satellite spectrum provides far less capacity in a given market than a MHz for terrestrial radio services. Commenters also cite differences between MSS and terrestrial services with regard to spectrum use, international coordination, geographic coverage, shared spectrum and target market.[507]

(2) *Discussion*

269. We agree that there are significant differences and open questions. Hence, we will exclude MSS from this cap, even though, as proposed, a licensee in that service can obtain more than 5 MHz. The equivalent yield (capacity per geographic market) of a given amount spectrum used for terrestrial-based and satellite-based technology is very different, making it unreasonable to equate relative spectrum usage for purposes of determining a spectrum aggregation limit. Currently, providers of MSS expect to serve as a complement to terrestrial services for the most part since their service will be relatively expensive and therefore generally will not be a constraining factor on the price of terrestrial services. Moreover, MSS services are subject to international coordination and allocation considerations that distinguish them from terrestrial CMRS.

4. Implementation Issues

a. Maximum Attributable SMR Spectrum

(1) *Pleadings*

270. Nextel claims that equating SMR and cellular spectrum would not achieve regulatory parity because of important differences in the way spectrum is licensed. For example, SMRs are assigned either one or five 25 kHz channels at a time. Their licensee service areas are station-based, defined by the characteristics of each individual base station, thus requiring the linking of these stations through overlapping coverage to approximate the geographic area in which a cellular licensee obtains an exclusive spectrum assignment. Co-licensees are entitled to co-channel interference protection, which is said to preclude wide-area SMR licensees from using all of their channels in a portion of the market. Taken

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[504] Constellation Comments at 23; LQP Comments at 2; Motorola Comments at 8; TRW Comments at 2; APC Comments at 2.

[505] *See* Comsat Reply Comments at 3.

[506] AMSC Comments at 9.

[507] *See, e.g.*, LQP Comments at 4-6.

together, these constraints require wide-area SMR operators to "piece together" non-contiguous spectrum at frequencies that vary from site to site.[508]

271. In the event the Commission imposes a spectrum cap, Nextel contends that wide-area SMR licensees should never be charged with greater than 5 MHz of wide-area SMR spectrum in a given service area so long as SMR spectrum is licensed on a station-by-station non-contiguous basis, and a licensee should be free to demonstrate that it has an even lower equivalent spectrum yield based on its actual assignments.

272. Nextel supports this proposal with examples drawn from its experience as an SMR licensee in San Francisco and Houston. In San Francisco, Nextel calculates that the channel licenses it has applied for or been granted provide an average equivalent yield of 7.8 MHz, approximately 31 percent of the 25 MHz spectrum assigned to each cellular licensee. In Houston, Nextel asserts that the equivalent yield is 5.7 MHz or 23 percent of cellular. Nextel claims that these comparisons actually overstate the equivalent yield because SMRs must use non-contiguous spectrum and proportionately more control channels.[509]

273. Other wide-area SMR commenters state similar views.[510] Some commenters also contend that a spectrum cap would inhibit the ability of SMRs to attract capital investment needed to establish systems capable of competing with other CMRS providers.[511]

274. The issue presented to us is whether the various characteristics of wide-area SMR licensees -- that they are newer and smaller than cellular carriers, do not currently possess market power, and use spectrum subject to important encumbrances -- justify some difference in applying the cap on broadband terrestrial mobile spectrum to SMR licenses.

(2) *Discussion*

275. While we conclude that SMRs should be subject to spectrum aggregation limits, we also find that the arguments of Nextel and other SMRs that SMR spectrum is not currently equivalent to cellular or broadband PCS spectrum have some merit. SMR spectrum is encumbered in comparison with cellular. The biggest problem is that SMR channels are assigned on a station-by-station basis. A licensee with a station in a given market is limited to a greater degree than cellular in its ability to reconfigure by the existence of neighboring

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[508] Nextel Comments at 28-31.

[509] *Id.* at 28-34.

[510] *See* AMTA Comments at 32-34; OneComm Comments at 13-14; Pittencrieff Comments at 16; Dial Page Comments at 3-4.

[511] AMTA Comments at 32; Comcast Comments at 11-12; OneComm Comments at 12-13; Pittencrieff Comments at 15-16; Dial Page Comments at 4.

co-channel users. In addition, SMR spectrum is not available as a contiguous block. Therefore, even if a licensee has more than 10 MHz, we will attribute a maximum of 10 MHz of SMR spectrum to that entity.[512] These 10 MHz are equivalent to the largest possible block of *contiguous* SMR spectrum. This 10 MHz SMR attribution within the 45 MHz cap on cellular-SMR-PCS spectrum is less restrictive than the 5 MHz SMR attribution recommended by Nextel with the proposed 40 MHz cap. Under the rule we are adopting, an entity with under 5 MHz of attributable SMR spectrum is eligible for up to 40 MHz of broadband PCS spectrum.

b. Attributable Cross-Ownership

276. We proposed a 5 percent cross ownership limitation for the general CMRS cap.[513] Most commenters believe that such a rule would be too restrictive. AirTouch, for example, stated that such a rule would defeat the Commission's goal of fostering diverse and competitive services.[514] In broadband PCS and cellular, cross-ownership attribution levels are 20 percent. Because use of another limit in this context could create inconsistent results,[515] we are adopting a 20 percent cross-ownership attribution rule for purposes of this SMR, broadband PCS, and cellular spectrum aggregation limit.[516] Thus, entities with 20 percent or more ownership of an SMR with over 5 MHz of spectrum in a MTA or BTA are effectively limited to 30 MHz of broadband PCS spectrum in that geographic market.

277. In determining attribution when cellular, broadband PCS and SMR licensees are held indirectly through intervening corporate entities, we will use the multiplier adopted in

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[512] Consistent with our approach in PCS, we will not attribute backhaul spectrum for the purposes of counting spectrum towards the cap.

[513] *Further Notice*, 9 FCC Rcd at 2884 (para. 101).

[514] AirTouch Comments at 18.

[515] The Federal Accounting Standards Board (FASB) explicitly states that ownership interests below 20 percent presumptively do not have control and above 20 percent they do unless evidence to the contrary is established. FASB Accounting Principles Board Opinion No. 18 (1970). We will continue, however, to maintain the within-service attribution thresholds for both PCS and cellular at 5 percent. Thus, an entity with 5 percent or more ownership of a cellular licensee in one market generally may not own more than 5 percent of the other licensee. *See* 47 CFR §§ 22.945 and 24.204, which include limited exceptions for certain entities such as investment companies, and a multiplier for indirectly held interests.

[516] This decision has no effect on our rule attributing ownership interests of 5 or more percent for purposes of the 40 MHz cap on broadband PCS ownership interests in any geographic area. *See* 47 CFR § 24.229(c).

the *Broadband PCS Further Order On Reconsideration*,[517] rather than a bright-line cross-ownership attribution standard. That multiplier is currently used by the Commission in the attribution rules in the broadcast context. It is also consistent with the FASB language above that discusses both direct and indirect ownership interests. Finally, we adopt several additional attribution rules that are consistent with the broadband PCS-cellular cross-ownership attribution rules.[518] These additional rules provide that officers and directors have an attributable interest in their company, non-voting stock in excess of the levels discussed in this paragraph is attributable, stock interest held in trust is attributable to those who have or share the power to vote or sell the stock, debt and instruments such as warrants with rights of conversion to voting interests are generally not attributable until conversion is effected, and limited partnership interests are attributable.

c. Designated Entities

278. We also sought comment on whether to apply a different standard for designated entities, *i.e.*, minorities and women, rural telephone companies, and small businesses, to ensure their full participation in the developing CMRS market.[519] Although there was little comment on this subject in this proceeding, we are extending the 40 percent cellular attribution rule for entities with non-controlling cross ownership in PCS as subsequently adopted in the *Broadband PCS Reconsideration Order* to SMRs.[520] Therefore, an entity may hold up to a 40 percent non-controlling interest in SMR licensees before its SMR interest will be deemed attributable for purposes of this cellular-PCS-SMR spectrum cap, but must limit its participation in a PCS licensee controlled by women or minority group members to a non-controlling interest. In addition, any designated entity with a non-controlling interest in an SMR licensee of less than 40 percent will not be deemed to have an attributable interest.

d. Geographic Attribution

279. We proposed and are adopting a 10 percent population overlap threshold. A provider's spectrum counts toward the cellular-PCS-SMR spectrum cap if the carrier is

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[517] Amendment of the Commission's Rules To Establish New Personal Communications Services in the 2 GHz Band, GEN Docket No. 90-314, Further Order on Reconsideration, FCC 94-195, released July 22, 1994 (*Broadband PCS Further Order on Reconsideration*).

[518] *See* 47 CFR § 24.204(d).

[519] *Further Notice*, 9 FCC Rcd at 2884-85 (para. 103).

[520] *Broadband PCS Reconsideration Order*, at paras. 125-127. "Control" is defined in our Broadband PCS competitive bidding order. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, FCC 94-178, released July 15, 1994, at para. 164.

licensed to serve 10 percent or more of the population of the MTA or BTA.[521] Of the commenters, only AMTA disagreed with this approach.[522] This is consistent with the standard adopted in the *Broadband PCS Reconsideration Order*.[523] To apply this rule to SMRs licensed on a station-by-station basis, we will presume that the SMR service area covers less than 10 percent of population of an MTA or BTA if none of the SMR's base stations is located inside the PCS service area. If any of the SMR's base stations are located inside the PCS service area, the channels licensed at those sites will be presumed to cover 10 percent of the population and count towards the spectrum cap unless the licensee shows that its protected service contour (40 dBu) for all of its base stations covers less than 10 percent of population of the PCS service area.

e. Calculation of Attributable SMR Spectrum

280. To calculate attributable SMR spectrum towards the cellular-PCS-SMR spectrum cap, we count all SMR channels meeting the 10 percent population benchmark in the PCS service area as discussed in paragraph 279. Both 800 and 900 MHz channels count towards this limit. RMD opposed including 900 MHz in any spectrum cap due to the small amount of spectrum and the narrow channel bandwidth.[524] Extending the cap from the proposed 40 MHz to 45 MHz does not impact PCS eligibility for an entity that only has SMR licenses in the 900 MHz band, because there is only 5 MHz SMR spectrum in the 900 MHz band. Since high quality mobile telephony service can be provided on 900 MHz SMR channels and there is the possibility of aggregating up to 5 MHz of spectrum in this band, there seems no compelling reason to exclude those channels.

281. Thus, to calculate whether attributable SMR spectrum exceeds 5 MHz, the threshold that results in an impact on PCS eligibility, all attributable SMR base stations inside the MTA or BTA must be identified. To compute an SMR spectrum total, the licensee must count all the 800 MHz channels and 900 MHz channels. All 800 MHz and 900 MHz channels located on at least one of those identified base stations count as 50 kHz (25 kHz pairs) and 25 kHz (12.5 kHz pairs), respectively. This total can be reduced using the 10 percent test discussed in paragraph 279.

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[521] *Further Notice*, 9 FCC Rcd at 2884 (para. 102). For example, if a cellular carrier's cellular service area covers 10 percent or more of an MTA or BTA, that carrier is considered to be in the MTA or BTA and is attributed with 25 MHz of spectrum for purposes of the cap.

[522] AMTA Comments at 33-34. APC and New Par agree with this approach. APC Comments at 3; New Par Comments at 18.

[523] *Broadband PCS Reconsideration Order*, at para. 136.

[524] RMD Reply Comments at 5.

282. This approach is relatively simple and fair. It is simple, because the calculation requires identifying only base stations located in the MTA or BTA, listing the channels and using a straight-forward multiplication. Where more than one SMR might have base stations for a given channel in a specific market, the SMR may feel disadvantaged. We note, however, that for PCS licensing this is very similar to cases where a cellular carrier MSA overlaps an MTA or BTA, but does not fully cover the market.

f. Timing

283. With regard to timing, some commenters question whether the spectrum cap proposed in the *Further Notice* may be imposed on SMRs that do not obtain full CMRS legal status until August 10, 1996.[525] Other commenters, however, argue that application of a CMRS spectrum cap to grandfathered SMR licensees is necessary to avoid regulatory disparity.[526] We believe these issues warrant further examination.

284. We will require PCS, cellular and SMR applicants to certify at the time of licensing that they are in compliance with the provisions of the cap.[527] The Commission will retain authority to determine questions of compliance and to take appropriate enforcement measures if an entity is found to have excessive PCS, cellular, or SMR interests with this cap. We will delegate authority to the appropriate Bureau to develop a new form or modify existing forms for licensees to make this certification and/or provide information showing they are in compliance with the cap.

285. Finally, paralleling our decision regarding cellular interests, we are allowing firms with interests in SMR licenses to divest themselves of their SMR interests after the PCS auction so that they come into compliance with our rules after they know the results of the auction. We are not limiting this divestiture to small population overlaps because given their current market positions, we are not as concerned about the incentives of SMR operators strategically delay the introduction of PCS as we are about the incentives of cellular operators.

E. Licensing Rules and Procedures

1. *Application Forms and Procedures*

a. Background and Pleadings

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[525] *See* AMTA Reply Comments at 9-10; Dial Page Comments at 5 n.4 (arguing a spectrum cap should only apply prospectively after August 1996); Motorola Reply Comments at 21; Nextel Reply Comments at 27-30; *see also* OneComm Comments at 13.

[526] New Par Comments at 19-20; Southwestern Bell Comments at 16-17.

[527] *See* Form 600, Appendix A.

286. In the *Further Notice* we proposed to adopt a unified application form that would be used by all CMRS and PMRS applicants in all terrestrial mobile services. The proposed form, FCC Form 600, would replace both Form 401 (used under Part 22) and Form 574 (used under Part 90).[528] We tentatively concluded that the form, as proposed, provides several advantages. Specifically, the new form would simplify the application process, limit the information requested to relevant data, and facilitate electronic filing and automated information entry. We proposed further to use Form 600 to determine the regulatory classification of the applicants.[529]

(1) *Single Application Form*

287. Most commenters favor the adoption of a single application form for all CMRS and PMRS applicants.[530] Nevertheless, several recommend that we defer adoption of Form 600 until the industry acquires a greater familiarity with it and thus is in a better position to assess its efficacy.[531] A majority of the commenters criticize the fact that the Commission still requires applicants to file microfiche copies of their applications and they implore the Commission to adopt procedures for electronic filing.[532]

288. Only two commenters, Brown and Omnipoint, have voiced general dissatisfaction with the proposal. Brown contends that the effort to combine a wide variety of disparate radio services and merge the processing philosophies of the Common Carrier Bureau and the Private Radio Bureau is likely to lead to less satisfactory results than will the continued use of different application forms for different types of radio services.[533] Omnipoint urges us to modify the form by adopting a blanket license approach, rather than a site-specific approach, for broadband PCS licensees. Citing Section 24.11(b) of the Rules,

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[528] *Further Notice*, 9 FCC Rcd at 2886 (para. 109).

[529] *Id.* (paras. 110-112).

[530] *See, e.g.*, APACG Comments at 5; APACG Reply Comments at 2-3; APC Comments at 5; Bell Atlantic Comments at 13-14; GTE Comments at 13; McCaw Comments at 31; NABER Comments at 38; PCIA Comments at 22; PCIA Reply Comments at 15; RAM Tech Comments at 22; UTC Comments at 4.

[531] *See, e.g.*, APACG Comments at 5; Celpage Comments at 23; Dial Page Reply Comments at 9; GTE Comments at 13; Metrocall Comments at 23; NABER Reply Comments at 4; Network USA Comments at 23; Nextel Reply Comments at 45-46; PCIA Comments at 22; PCIA Reply Comments at 16.

[532] *See, e.g.*, Brown Comments at 25; Celpage Comments at 24; Metrocall Comments at 24; Network Comments at 24; LegalCom Comments at 2; RAM Tech Comments at 22-23; PCIA Comments at 40.

[533] Brown Comments at 21-28.

Omnipoint claims that the site-specific applications that would be required by Sections C and F of Form 600 apply to PCS.[534]

289. Most of the commenters suggest that some type of format modification be effected before Form 600 is adopted. Some recommend that the form be repackaged to separate clearly those questions that pertain solely to CMRS from the questions that apply to both CMRS and PMRS applicants.[535] Some think that the form should be condensed.[536] NABER, for instance, recommends moving the text of qualification and certification questions to the instructions and having the applicant sign a simple statement of general compliance with the requirements.[537] Some commenters quarrel with the specific technical information the form requests. A typical example is the GTE claim that requiring geographic information based on the North American Datum of 1927 (NAD 27), which has been superseded by the North American Datum of 1983 (NAD 83), will cause confusion and lead to errors.[538]

(2) *Regulatory Classification of Applicants*

290. Response to the proposal to employ Form 600 as a vehicle for determining the regulatory classification of an applicant is limited. Only three commenters directly address the proposal and all three generally support the idea of a single unified application form.[539] One of the commenters, however, conditions its support on the form not being unnecessarily complicated.[540]

(3) *Single Cut-Over Date*

291. PCIA recommends a single cut-over date for all services using the new form to ensure a smooth transition, which would benefit the Commission and CMRS applicants. A single cut-over date would decrease the likelihood of the Commission receiving superseded application forms and the attendant repetitious task of processing the forms. A single cut-over

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[534] Omnipoint Comments at 1-7; *see also* Pacific Reply Comments at 10.

[535] *See, e.g.*, API Comments at 4; Brown Comments at 24-25; ITA/CICS Comments at 9; NABER Comments at 38; UTC Comments at 4-5.

[536] *See, e.g.*, Brown Comments at 30-33; Celpage Comments at 23-24; Metrocall Comments at 23; NABER Comments at 38-40; Network Comments at 23.

[537] NABER Comments at 38-40.

[538] GTE Comments at 13; *see also* Brown Comments at 32; McCaw Comments at 32-33.

[539] *See* AMTA Comments at 36; CTIA Comments at 4; and PCIA Comments at 22-23.

[540] AMTA Comments at 36.

date would also minimize confusion among small entities that have only limited, irregular need to file applications with the Commission, and it would enable large carriers that utilize a computerized version of the application to make a single change in their software. PCIA suggests deferring use of the new form until six months after the final form has been published in the Federal Register, which it believes would give everyone adequate lead time to implement the new requirements. It notes that the Budget Act appears not to require CMRS entities to use the same form as of August 10, 1994.[541]

(4) *Notification of Construction*

292. In addition to the adoption of Form 600, PCIA recommends the adoption of a new standardized, modular notification of status of facilities form. It also believes that the Commission should reconsider revision to our certification of completion of construction procedures. Specifically, it encourages the Commission to adopt procedures similar to those we utilize for Part 90 licensees, by which they receive a computer-generated Form 800A notification near the end of the construction period requesting confirmation that construction has been completed. In the event a permittee or conditional licensee does not respond after two such notices, a final computer-generated notice is mailed, indicating that the license will be terminated in the event a response is not received within a stated time. PCIA submits that this process has significant benefits for permittees, and, because it is almost entirely automated, requires little of the Commission's resources to administer.[542]

b. Discussion

(1) *Single Application Form*

293. We will not defer adoption of Form 600. Although we appreciate the concern of the commenters who claim that requiring the immediate use of the form may lead to some confusion, we firmly believe that our reclassification of Part 90 and Part 22 licensees as CMRS providers in the *CMRS Second Report and Order* will generate more confusion if use of the new form is delayed. Although these licensees, especially those currently licensed under Part 90, are familiar with their respective license application forms, *i.e.*, Form 574 and Form 401, these forms were not designed, as is Form 600, to meet the requirements of the new CMRS and PMRS regulatory classifications established by Congress. Consequently, attempting to use Forms 574 and 401 until applicants are more familiar with the requirements of Form 600, we believe, will hinder the transition to CMRS.

294. The dissatisfaction with microfiche is also appreciated. Similar concerns were raised by commenters in the *Part 22 Rewrite* proceeding. As we explained there, while we recognize that the microfiche requirement is somewhat burdensome, it is, nevertheless,

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[541] PCIA Comments at 24.

[542] *Id.* at 24-25.

necessary because the Commission currently lacks adequate file space to maintain full-size paper station files. Microfiche, therefore, provides the best interim solution until we are able to implement procedures for electronic filing.[543] Objection to the requirement that applicants base their geographical information on NAD 27 rather than NAD 83 data is also understandable. Like the microfiche requirement, use of NAD 27 is an interim obligation that must be maintained until the Commission completes our conversion to NAD 83.[544] Form 600 provides space for coordinates based on NAD 83, which is required by the Federal Aviation Administration (FAA), in order to accommodate applicants who desire to provide the information as a means of clarification as to the accuracy of the coordinates they have furnished. No applicant is obligated, however, to include NAD 83 information in its application.

295. We reject the suggestions that the text of some questions should be moved to the instructions as a means of shortening Form 600. Any benefit derived from this suggestion would be, at best, illusory. The same amount of text must be read by an applicant, whether it is located in the instructions or in the application. More importantly, juxtaposing text and questions in these matters diminishes the likelihood of applicant error and the possibility of a resulting dismissal of an application. This is especially true when the inquiries concern an applicant's response to the qualification and certification questions, which are of principal importance in determining its fitness to be a Commission licensee. Similarly, we do not believe that other suggested format modifications are warranted, at least at this point. Given the fact that nearly all of the commenters are generally satisfied with Form 600, we believe it would be wiser to withhold modifying the form until applicants become more familiar with it. We fear that attempting to fine tune Form 600 at this stage may create more problems than it solves. Any practical problems that become apparent after the form is in use can be resolved by subsequent revisions to the form.

296. Finally, in response to the argument that Form 600 is at odds with the Rules because of its alleged requirement that broadband PCS file site-specific information, we note that the issue of whether Form 600 should require PCS licensees to file site data in those instances in which the proposed location of a station causes a recognized concern about either significant effects on the environment or international coordination, will be addressed in a rule making we will initiate in the near future regarding final Part 24 rules for PCS.

(2) *Regulatory Classification of Applicants*

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[543] *See Part 22 Rewrite Order*, Appendix A (discussion of Section 22.105).

[544] *See* Public Notice, "FCC Interim Procedure for the Specification of Geographic Coordinates," DA 88-316, 3 FCC Rcd 1478 (1988); Public Notice, "The Federal Communications Commission Continues To Require Applicants To Use Coordinates Based on the North American Datum of 1927," DA 92-1188, 7 FCC Rcd 6096 (1992).

297. We will adopt our proposal to use Form 600 for determining the appropriate regulatory classification of all mobile services, based on an applicant's response to questions of whether the service it proposes to provide meets the three criteria of the statutory definition of CMRS. The comments confirm our tentative conclusion that this procedure provides both an independent basis for verifying that the applicant's requested classification is consistent with the nature of the service it intends to offer, and an effective check against misrepresentation.

(3) *Single Cut-Over Date*

298. We agree with PCIA's assessment that both CMRS applicants and the Commission would benefit from a smooth transition in the use of a newly adopted Form 600, and that in order for this to happen, there should be a single cut-over date, applicable to services using the form. We disagree, however, with its suggestion that the cut-over date should occur after the transition to CMRS has been completed. Using superseded application forms, even for a limited time, after the new rules are in effect would subject applicants and the Commission to needless processing burdens. The cut-over date for using the Form 600 will, therefore, be the same date that the rule changes we are adopting today become effective. Since the Rules generally require publication in the Federal Register to occur not less than 30 days before any rule issued by the Commission takes effect, we believe that all concerned parties will have sufficient lead time to familiarize themselves with the Form 600.[545]

(4) *Notification of Construction*

299. The adoption of a standardized notification of construction form for use in connection with all CMRS licenses is a valid and worthwhile proposal. We conclude, however, that the development of such a form requires further analysis. Accordingly, exploration of possible formats and revision of the notification procedures must await a subsequent Further Notice of Proposed Rule Making which we intend to issue. This proceeding also will examine PCIA's suggestion that procedures patterned after those used for Part 90 licenses should be adopted for use in connection with CMRS.

2. *Qualifying Information*

a. Background and Pleadings

300. Our current licensing procedures require Part 22 applicants to provide certain qualifying information that is not required of Part 90 applicants. For example, because common carriers are subject to the alien ownership restrictions of Section 310(b) of the Act,

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[545] *See* 47 CFR § 1.472(a).

Part 22 applicants must disclose any alien ownership or control.[546] Section 308(b) of the Communications Act authorizes the Commission to prescribe regulations relating to citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station, including certification that the applicant has not violated the Anti-Drug Abuse Act of 1988.[547] Consequently, Part 22 applicants must disclose ownership interests of 5 percent and greater as well as certain information about the parties holding these interests that the Commission has determined to be relevant to assessing their qualifications.[548]

301. In the *Further Notice*, we proposed to require all CMRS applicants, including Part 90 applicants that request CMRS station classifications, to disclose on Form 600 any ownership or control interest in the applicant held by an alien.[549] This disclosure is identical to the disclosure currently required of Part 22 applicants on Form 401.

302. McCaw contends that all CMRS applicants should be required to provide comparable qualifying information.[550] Bell Atlantic claims that the *Further Notice* creates an ambiguity in stating that Part 22 applicants must disclose whether they or ''any controlling party'' have had Commission licenses revoked, whereas the current Form 401 and Section 22.13 of the Commission's Rules apply to ''any party'', not just controlling parties.[551] Bell Atlantic argues that the disclosure requirements should apply only to the applicant or a controlling party since any broader application would require disclosure from individuals or entities with little relationship to the applicant and with no control over operations.[552] Bell Atlantic contends that such obligations are not imposed upon Part 90 licensees, and insists that as long as applicants and ''controlling parties'' are disclosed, the Commission's need to identify ''real parties in interest'' is satisfied. As such, Bell Atlantic requests that the Commission revise Section 22.13 of our Rules, as well as the parallel provision for PCS, Section 24.13 of the Commission's Rules.[553]

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[546] Part 90 applicants are required only to certify compliance with Section 310(a), which bars foreign governments and their representatives from holding any Commission license. *See* Form 574, Certification No. 4.

[547] 47 U.S.C. § 308(b).

[548] *See* Form 401.

[549] *Further Notice*, 9 FCC Rcd at 2887 (para. 114).

[550] McCaw Comments at 34.

[551] Bell Atlantic Comments at 14 (*citing* 47 CFR § 22.13 current rule).

[552] *Id.*

[553] *Id.* at 15.

303. PageNet argues that the Commission should revise proposed Form 600 to alert partnerships that they must observe the alien ownership restrictions imposed in *Wilner & Scheiner*.[554] PageNet further alleges that Form 600 sweeps too broadly in requiring information on denial of applications, claiming that denial of an application for technical or formal deficiencies has no relevance to the assessment of later applications.[555]

b. Discussion

304. We conclude that the proposal set forth in the *Further Notice* should be adopted with some modifications. Section 310(b) prohibits the grant of radio licenses, including licenses for common carrier service, to aliens and to corporations with specific levels of alien ownership or control. For purposes of Section 310(b), we have determined that certain partnership interests, as well as certain other interests held by non-corporate entities and associations, may be considered ownership interests.[556] These policies and rules continue in effect and shall apply to all CMRS licensees, including those grandfathered Part 90 licensees who are not granted waiver of the application of Section 310(b) to any foreign ownership that lawfully existed as of May 24, 1993.[557]

305. We reject Bell Atlantic's proposal that we amend Part 22 of the Commission's Rules, and Form 401, to require qualifying information only from the applicant or a controlling party. This information is relevant to the Commission's review of license applications. Without it, we would be unable to carry out our statutory obligations. For instance, because alien ownership of a licensee may never exceed 25 percent, requiring

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[554] PageNet Comments at 31-32 (*citing* Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended, 103 FCC 2d 511 (1985) (*Wilner & Scheiner*), *recon. in part*, 1 FCC Rcd 12 (1986).

[555] PageNet Comments at 32.

[556] *See Wilner & Scheiner*, 103 FCC 2d at 520 (position occupied by general partners in a partnership is directly comparable to that of officers and directors in a corporation); *see also* Moving Phones Partnership, L.P. v. FCC, 998 F.2d 1051, 1055-57 (D.C. Cir. 1993), *cert. denied sub nom.* Cellswitch L.P. v. FCC, – U.S. –, 114 S.Ct. 1369 (1994) (Commission acted reasonably in rejecting applications on ground that partnerships had aliens among their general partners, and in not exempting from alien restriction partnerships in which alien general partners contractually relinquished control and management).

[557] In the First Report and Order in this docket, we established procedures for private mobile services reclassified as CMRS to file waiver petitions to retain existing foreign ownership interests. Those parties with approved waivers are exempt from the Section 310 only to the extent indicated in their waivers. *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, First Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1056 (1994). Thirty-three licensees have submitted waiver requests. These will be addressed in a separate order.

qualifying information only from controlling parties of a licensee would not provide us with sufficient facts to determine that at least 75 percent of ownership interests in the licensee is in the hands of American citizens. In addition to ensuring compliance with citizenship requirements, we are also obligated to ensure that radio licenses do not fall into the hands of persons lacking good character, *e.g.*, convicted felons and persons seeking to monopolize control of radio frequencies, and although a 5 percent ownership interest in a licensee would not result in control, a party holding an interest ranging from 5 percent to 49.9 percent could strongly influence the party or parties legally controlling the licensee. This is especially true in the case of larger corporate licensees. Lastly, the Anti-Drug Abuse Act of 1988, which applies to those Part 90 services that are reclassified as CMRS, requires certification from every owner of 5 percent of a licensee.

306. We do not believe that supplying this information imposes any undue burdens on parties. Aside from being extremely limited in scope, the information is sought only from those parties holding a 5 percent or greater ownership interest in a licensee. Consequently, no more than 20 persons would be subject to this nominal requirement with respect to any licensee. Further, in the *Part 22 Rewrite Order*, the Commission determined that these rules should remain intact.[558] Therefore, we do not find a compelling public interest reason for amending these rules. All parties to a CMRS application are required to comply with the alien ownership requirements specified in Section 310 of the Act and they must also disclose whether: (1) the party has had a Commission license or permit revoked or an application denied by the Commission; (2) the party has been found by a court to have monopolized radio communication; or (3) the party has been convicted of a felony. Parties also must certify that they have not violated the Anti-Drug Abuse Act of 1988.

3. *Application Fees*

a. Background and Pleadings

307. Under our current licensing procedures, Part 22 applicants pay an application filing fee of $265 per application for cellular and for non-cellular services, while the fee for Part 90 applications is $35 per call sign.[559] The reclassification of some Part 90 services as CMRS raises the issue of whether Part 90 CMRS applicants should be required to pay the same filing fee as Part 22 applicants. In the *Further Notice* we proposed to require all CMRS applicants in Part 90 services to pay the higher common carrier application fee.[560]

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[558] *See Part 22 Rewrite Order*, Appendix A (discussion of Sections 22.107, 22.108).

[559] *See* 47 CFR §§ 1.1102 (private radio fee schedule), 1.1105 (common carrier schedule). *See also Further Notice*, 9 FCC Rcd at 2887 (para. 115). The fees for Part 22 licensees were increased by the Commission from $230 to $265, effective July 18, 1994.

[560] *Further Notice*, 9 FCC Rcd at 2887 (para. 115).

308. Several commenters support the proposal for uniform fees.[561] Bell Atlantic and CTIA argue that regulatory symmetry compels adoption of the proposal that Part 90 and Part 22 licensees pay the same application and user fees.[562] APACG and PageNet support equivalent fees for similar services, but contend that the lower fee schedule would be more appropriate as a result of streamlined licensing.[563] PCIA argues that there should be a common application fee for substantially similar CMRS operators, which should be assessed on a "per application" basis to the extent permissible under Section 8 of the Act. PCIA also asserts that CMRS providers should be required to conform to the common carrier fee filing schedule for the various classes of notifications relating to the status of facilities.[564] NABER agrees that similar services should be charged the same application and regulatory fees, but suggests that the Commission justify such charges based on the processing and other functions to be performed by the Commission.[565] Nextel and Pagemart contend that raising application fees for Part 90 licensees would result in substantial and unreasonable burdens upon many CMRS providers.[566] Pagemart argues that such increased fees are not necessary or practical, and therefore would be contrary to the congressional mandate.[567]

309. Brown and other commenters assert that the Commission does not have the authority to revise the fee schedule.[568] Brown argues that had Congress intended to change the fees in any way, it would have done so, or expressly granted the Commission the

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[561] *See* AMTA Comments at 36-37 (regulatory parity should extend to fees but not until the Commission has reconciled our regulatory structures so that substantially similar services are regulated on a comparable basis); Bell Atlantic Comments at 15; CTIA Comments at 5; McCaw Comments at 34; New Par Comments at 20-21; *see also* E.F. Johnson Comments at 20 (wide-area SMRs should pay the $230 fee, but local SMR operators should pay the $35 fee); .

[562] Bell Atlantic Comments at 15; CTIA Comments at 5.

[563] APACG Comments at 6; APACG Reply Comments at 6-7; PageNet Comments at 30.

[564] PCIA Comments at 27-28; PCIA Reply Comments at 18.

[565] NABER Comments at 40-41. *Cf.* NABER Reply Comments at 17 (equalizing filing and regulatory fees at this time when the licenses are not similar results in cosmetic parity which would disadvantage Part 90 licensees).

[566] Nextel Comments at 47; Nextel Reply Comments at 41 (urging retention of the $35 application fee per application for SMR and wide-area SMR applicants pending adoption of wide-area SMR block licensing); Pagemart Comments at 11-12; Dial Page Reply Comments at 8-9 (advocating adoption of a single call sign for wide-area SMRs); Southern Reply Comments at 14.

[567] *See* Pagemart Comments at 11-12. *See also* Celpage Comments at 25-26.

[568] Brown Comments at 20; PCC Comments at 10-11.

authority to do so.[569] Brown and PCC contend that the inaction of Congress regarding this issue in Section 8 of the Act means that the Commission's authority to revise the fee schedule is limited to biennial adjustments in accord with the Consumer Price Index.[570] PCC asserts that Section 6002(d)(3) of the Budget Act, contrary to the Commission's assertions in the *Further Notice*, requires only that the Commission assure that licensees in substantially similar services are subject to "technical requirements that are comparable . . . ." PCC argues that fees are financial, not technical, requirements and therefore should not be included in this proceeding.[571] PCC further argues that the silence of Congress on the filing fee structure in Section 8 should be contrasted with its explicit grant of authority to the Commission to amend the regulatory fees imposed by Section 9 of the Act.[572]

b. Discussion

310. The record is inconclusive on the question of whether Part 90 licensees should be required to comply with the same application fee schedule as Part 22 licensees. We find, however, that this is an issue appropriately to be decided by Congress. As certain commenters have noted, Congress has not granted the Commission the authority to amend the application fee schedule. Thus, we conclude that we may not take any action to change the application fee schedule in this proceeding. Consequently, reclassified Part 90 licensees will continue to be subject to the current fee schedules under Part 90 of our Rules. We note, however, that pending before Congress is H.R. 4522, the Federal Communications Commission Authorization Act of 1994. As reported by the Committee on Energy and Commerce of the House of Representatives, the legislation would commit to the Commission the authority to modify fees assessed pursuant to Section 8(b) of the Act. Any modification would be premised primarily on the costs relating to the processing of the application or filing. If enacted, the Commission's examination of filing fees for Part 90 and Part 22 applications would be done in this context.

4. *Regulatory Fees*

a. Background and Pleadings

311. In the Budget Act, Congress added new Section 9 to the Communications Act, which authorizes the Commission to collect annual regulatory fees from all Commission

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[569] Brown Comments at 19.

[570] *Id.* at 20; PCC Comments at 11.

[571] PCC Comments at 11-12.

[572] *Id.* at 12-13.

licensees to recover costs incurred in carrying out our regulatory activities.[573] In the *Further Notice*, we proposed to require all Part 90 CMRS licensees to pay the same per subscriber fee as other CMRS providers instead of the per-license fee established for private radio services.[574]

312. CTIA and McCaw support the proposal that all CMRS applicants in Part 90 services should be required to pay the same per-subscriber regulatory fee as other CMRS providers. They argue that such an approach is consistent with the congressional mandate to achieve regulatory symmetry.[575] Nextel favors uniformity of fees, but contends that any increased fee imposed on wide-area SMRs should be phased in over time.[576] NABER agrees that carriers providing similar services should be charged the same application and regulatory fees, but suggests that the Commission justify such charges based on the administrative costs incurred by the Commission.[577] RMD supports the proposed change in regulatory fees for all SMR licensees, including, but not limited to, CMRS operators, to a per subscriber basis.[578]

313. Brown contends that Section 9 of the Act, passed at the same time that Congress required regulatory parity, governs the regulatory fees for the services enumerated therein, and that the Commission is therefore bound to charge SMRs the enacted regulatory fee.[579] Pagemart opposes imposition of the same fee of $60 per 1000 subscribers on all CMRS licensees, claiming that the Commission has not demonstrated how the proposed fee would be necessary to cover Commission costs, how the Commission's processes would change, or how the increased costs would be reasonably related to the benefits provided to the private mobile service provider.[580]

b. Discussion

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[573] Budget Act, § 6003(a), *codified at* 47 U.S.C. § 159.

[574] *Further Notice*, 9 FCC Rcd at 2887 (para. 116).

[575] CTIA Comments at 5; McCaw Comments at 34.

[576] Nextel Comments at 48-49; Nextel Reply Comments at 42.

[577] NABER Comments at 40-41.

[578] RMD Comments at 12 (the change will necessitate a change in the application fee for such systems because under the new SMR application fee schedule, regulatory fees are embedded in the application fees for new licenses, renewals, and reinstatements).

[579] Brown Comments at 20.

[580] Pagemart Comments at 13-14.

314. Section 9(a) of the Communications Act requires the Commission to "assess and collect regulatory fees to recover the costs of . . . enforcement activities, policy and rulemaking activities, user information services, and international activities. . ."[581] Section 9(b)(3) of the Act gives the Commission authority to "amend the Schedule of Regulatory Fees if the Commission determines that the Schedule requires amendment to comply with the requirements of paragraph (1)(A). . . ."[582] Section 9(b)(1)(A) provides that any fees assessed pursuant to Section 9 "be derived by determining the full-time equivalent number of employees performing the activities described in subsection [9](a) . . ."[583]

315. In the *Fees Order*, we observed that any change to the regulatory fees schedule is conditioned on certain requirements.[584] Specifically, we noted that Section 9(i) of the Act requires the Commission to utilize accounting systems necessary to make adjustments to the fee schedule and to afford interested persons the opportunity to submit comments concerning the allocation of the costs of performing the functions described in Section 9(a)(1) among the services in the schedule.[585] Although we believe that principles of regulatory parity dictate that fees for similar services be equivalent, we have not yet determined the specific costs associated with our enforcement, policy, and rule making activities relating to the regulation of CMRS. In order to provide interested parties with the opportunity to comment on the costs associated with the regulation of CMRS, we will address these questions in a subsequent rule making proceeding concerning proposed changes to the regulatory fee schedule for fiscal year 1995. Until we take such action, the regulatory fee schedule contained in Section 9(g) of the Act remains in effect.[586]

5. *Public Notice and Petition To Deny Procedures for CMRS Applications*

a. Background and Pleadings

316. In the *Further Notice* , we explained that Section 309(b)(1) of the Act requires that common carrier applications and substantial amendments (other than minor amendments excepted under Section 309(c)) must be placed on public notice for 30 days prior to grant, and that subsection (d) of Section 309 permits the filing of petitions to deny during the public

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[581] Communications Act, § 9(a), 47 U.S.C. § 159(a).

[582] Communications Act, § 9(b)(3), 47 U.S.C. § 159(b)(3).

[583] Communications Act, § 9(b)(1)(A), 47 U.S.C. § 159(b)(1)(A).

[584] Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, MD Docket No. 94-19, Report and Order, FCC 94-140, at para. 11 (released June 8, 1994) (*Fees Order*).

[585] Communications Act, § 9(i), 47 U.S.C. § 159(i).

[586] Communications Act, § 9(g), 47 U.S.C. § 159(g).

notice period.[587] We therefore proposed to apply these statutory requirements, which are currently included in Part 22 of the Rules, to all CMRS applicants. In addition to initial license applications, we proposed to extend public notice and petition to deny procedures to applications for major modifications, and for assignments or transfers of control, of Part 90 CMRS licenses. We also sought comment regarding possible methods for applying these statutory requirements to reclassified CMRS licensees without unnecessarily delaying the speed and efficiency of the licensing process.[588]

317. Most of the commenters addressing these concerns support the proposal to apply public notice and petition to deny procedures to all CMRS services, and virtually all of these commenters concur that we are not authorized under the Communications Act to forbear from applying these application procedures.[589] Several commenters also provide suggestions for guarding against having the procedures delay the speed of our license processing.[590] Nearly all of these commenters submit that deterring frivolous protests will expedite the licensing process.[591] Some suggest that we accomplish this by strictly enforcing the statutory requirement that a petitioner have standing to protest an application.[592] Another suggestion is to apply the ''greenmail'' restrictions of Part 22, which prevent a person from receiving any more than his or her legitimate and prudent expenses in exchange for withdrawing an action, or threat thereof, against an application.[593] One commenter, APACG, recommends that we require litigants to supply draft orders along with their pleadings.[594] Another commenter, PageNet, advocates speeding up the Part 90 paging application process by commencing the frequency coordination process, as well as the processing of major amendments and

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[587] *Further Notice,* 9 FCC Rcd at 2887 (para. 117).

[588] *Id.* at 2887-88 (para. 118).

[589] *See, e.g.,* AMTA Comments at 37; APACG Comments at 6; Bell Atlantic Comments at 15; NABER Comments at 41; New Par Comments at 21-22; PageNet Comments at 33; PCIA Comments at 30; RMD Comments at 12; RMR Comments at 6-7 (unpaginated).

[590] *See, e.g.,* AMTA Comments at 37; Celpage Comments at 27; Metrocall Comments at 27; Network Comments at 27; PageNet Comments at 34; PCIA Comments at 33-34; RAM Tech Comments at 25-26.

[591] *See, e.g.,* Celpage Comments at 27; Metrocall Comments at 27; Network Comments at 27; PageNet Comments at 34; RAM Tech Comments at 25; RMR Comments at 7 (unpaginated).

[592] *See, e.g.,* Celpage Comments at 26; Metrocall Comments at 26; Network Comments at 26; RAM Tech Comments at 25-26.

[593] *See, e.g.,* Celpage Comments at 27; Metrocall Comments at 27; Network Comments at 27; PageNet Comments at 34; PCIA Comments at 33-34; RAM Tech Comments at 26.

[594] *See* APACG Comments at 6.

modification application, upon receipt of the filings, rather than waiting until the public notice period has expired.[595]

b. Discussion

318. We conclude that implementation of Section 309 of the Act requires that we amend Part 90 of the Rules to apply the public notice and petition to deny procedures set forth in Part 22 to all CMRS applications.[596] The Part 90 services to which these application procedures will apply are the SMR, 220 MHz, Business Radio, and Paging services that have been reclassified as CMRS. All other PMRS services will remain subject to application procedures currently contained in Part 90.

319. In addition, we find the commenters' suggestions concerning possible ways to minimize delay associated with the new processing requirements both informative and constructive. We are in complete agreement with the suggestion that the Part 22 "greenmail" restrictions be incorporated into Part 90 for CMRS licensees.[597] We established the policy, in the common carrier cellular radio service of restricting a petitioner's compensation to only those legitimate and prudent expenses incurred in reaching settlement, in order to deter frivolous protests, filed primarily for anticompetitive or abusive reasons. We believe the same policy should be pursued with regard to other CMRS services. Furthermore, incorporating these Part 22 provisions into Part 90 is within the scope of the proposal we made in the *Further Notice* to achieve regulatory symmetry among the CMRS services,[598]and at the same time, will not unnecessarily affect the speed and efficiency of the licensing process.[599] We also agree with those commenters who favor stricter enforcement of the standing requirement. Every petitioner is expected to meet all of our applicable procedural and filing requirements, including a demonstration that it has standing as a "party in interest," as a threshold obligation before putting forth objections to the application.[600] Failure to meet this obligation will result in summary dismissal of a petition to deny or other objection. Enforcing strict compliance with our procedural requirements, we believe, will effectively reduce processing delays caused by frivolous and ill-conceived petitions to deny and thus will assist in minimizing delays in offering CMRS service to the public. We are

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[595] *See* PageNet Comments at 33.

[596] *See* 47 CFR §§ 22.127, 22.130.

[597] *See* 47 CFR §§ 22.129, 22.936.

[598] *See Further Notice,* 9 FCC Rcd at 2865-66 (paras. 5-9).

[599] *Id.* at 2887-88 (para. 118).

[600] *See* Communications Act, § 309(d)(1), 47 U.S.C. § 309(d)(1); 47 CFR § 22.130.

therefore incorporating into Part 90 the procedural requirements contained in Section 22.130 of the Commission's Rules.[601]

320. We are not convinced, however, that requiring the parties in a proceeding involving a contested CMRS application to include draft orders with their pleadings would be beneficial. The additional time and expense of compiling and filing draft orders would not justify the small, if any, time savings that might result from such a requirement. As a general rule, the matters that we decide, because of their complexity, would not lend themselves to such a process. For example, it is likely that considerable time and effort on the part of Commission staff would be necessary to review and modify such draft orders.

321. Finally, as a general proposition, we agree with PageNet that application processing need not await termination of the public notice period, although we do not see the need for any rule change in this regard at this time. We do encourage our processing staff, however, to commence every processing procedure as quickly as possible, so long as doing so is not legally prohibited or impracticable.

6. *Mutually Exclusive Applications; Competitive Bidding*

a. General Background and Conclusions

322. The *Further Notice* tentatively concluded that competitive bidding procedures should generally be used to resolve competing CMRS applications where we have the authority to do so.[602] We acknowledged our obligation under Section 309(j)(6) of the Act to take steps to avoid mutual exclusivity in our application and licensing procedures, and thus we stated that we did not intend to preclude the use of first-come, first-served procedures, short filing windows, and similar procedures where appropriate. We also expressed our belief, however, that where we have the authority to select from among mutually exclusive applications by competitive bidding, it is generally advantageous to use reasonable filing windows that allow the filing of competing applications so that qualified applicants would not be excluded from consideration.[603]

323. The *Further Notice* generally proposed to continue the use of filing window procedures in Part 22 services, with some modifications, and to use competitive bidding to select a licensee from among mutually exclusive initial applications.[604] We also sought comment on whether we should adopt similar procedures for resolving mutually exclusive

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[601] 47 CFR § 22.130.

[602] *Further Notice*, 9 FCC Rcd at 2888 (para. 121).

[603] *Id.* (para. 122).

[604] *Id.* at 2888-89 (para. 123).

CMRS applications in Part 90 services subject to reclassification. We asked whether there are factors that may justify the use of different procedures, such as currently used first-come, first-served procedures, for some Part 90 services if a change in procedures would affect the availability of frequencies to PMRS as well as CMRS applicants.[605]

324. Prior to the adoption of the *Further Notice*, we had proposed in the Part 22 Rewrite proceeding to use first-come, first-served procedures for all Part 22 services.[606] Subsequent to the initiation of the Part 22 rule making, the Budget Act amended Section 309 of the Communications Act to authorize the Commission to use competitive bidding to choose among mutually exclusive initial applications. On April 20, 1994, we released the Second Report and Order in the competitive bidding proceeding, in which we decided to use competitive bidding to choose among mutually exclusive initial applications in most of the public mobile services governed by Part 22.[607] Subsequently, in the *Part 22 Rewrite Further Notice* we proposed to use a 30-day filing window and competitive bidding procedures to award 931 MHz paging authorizations from among mutually exclusive initial applications.[608]

325. In this proceeding, we take official notice of comments filed in response to the application filing and processing procedures proposed in the *Part 22 Rewrite Notice*.[609] The majority of commenters in the Part 22 rule making opposed the use of first-come, first-

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[605] *Id.* at 2889 (para. 124).

[606] Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115, Notice of Proposed Rule Making, 7 FCC Rcd 3658, 3659 (1992) (*Part 22 Rewrite Notice).*

[607] The *Competitive Bidding Second Report and Order* declined to adopt the use of competitive bidding for Rural Radio Service, including Basic Exchange Telecommunications Service (BETRS), which is governed by Part 22. Implementation of Section 309 (j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348, 2356 (1994) (*Competitive Bidding Second Report and Order*), *recon.*, Second Memorandum Opinion and Order, FCC 94-215, released Aug. 15, 1994.

[608] Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115, Further Notice of Proposed Rule Making, FCC 94-103, released May 20, 1994 *(Part 22 Rewrite Further Notice).*

[609] *See* Revision of Part 22 of the Commission's Rules Governing the Public Mobile Service, CC Docket No. 92-115, Amendment of Part 22 of the Commission's Rules To Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-Common Carrier Service, CC Docket No. 94-46, Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service, CC Docket No. 93-116, Report and Order, FCC 94-201, adopted Aug. 2, 1994 (*Part 22 Rewrite Order*).

served procedures for Part 22 services.[610] In the *Part 22 Rewrite Order* which we recently adopted, we decided to use 30-day notice and cut-off and competitive bidding procedures for the 931 MHz paging service.[611] For other CMRS applications governed by Part 22, we deferred a decision to this docket.[612]

326. In response to the *Further Notice* in this proceeding, both APACG and PCIA generally favor the use of 30-day filing windows and competitive bidding to select licensees from among mutually exclusive applications, rather than the use of first-come, first-served filing procedures. APACG points out that first-come, first-served licensing increases the chance that licensees will be "boxed in" by "strike" applicants and unable to file competing applications.[613] PCIA believes that first-come, first-served procedures would force existing operators to file for and construct facilities earlier than necessary merely to protect their anticipated market area from others who may file applications in order to prevent expansion by the existing operators or in the expectation that they will be able to sell the authorization to the existing operator at a profit.[614] Southern supports 30-day filing windows only for initial applications to create or expand service areas.[615]

327. PageNet supports the use of filing windows and competitive bidding only where new frequencies are being allocated, as in personal communications services (PCS). Otherwise, argues PageNet, first-come, first-served procedures should be used because they are easy and efficient, allowing the Commission to expedite service to the public. PageNet believes that filing windows enable applicants who are not ready and willing to build facilities to file mutually exclusive applications simply to frustrate the business plans of another applicant. Although PageNet acknowledges that the first-come, first-served process might exclude qualified applicants from consideration, it concludes that any procedure ultimately excludes qualified applicants if they do not prevail in the selection process.[616] AMTA and NABER also favor the use of first-come, first-served procedures for CMRS licenses.[617]

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[610] *See Part 22 Rewrite Order*, at para. 7 & nn. 14-19.

[611] *Id.* at paras. 95-100.

[612] *Id.* at para. 15.

[613] APACG Comments at 14.

[614] PCIA Comments at 31-32.

[615] Southern Reply Comments at 10.

[616] PageNet Comments at 34-39.

[617] AMTA Comments at 39; NABER Comments at 42.

328. As discussed more specifically below, we conclude that we should generally use notice and cut-off and competitive bidding procedures to select among mutually exclusive CMRS applications where we have the authority to do so and where we find such processing to be in the public interest. Under these procedures, an initial application, as defined by the service rules,[618] that is found to be acceptable for filing will be put on public notice. Any mutually exclusive initial applications that are filed no later than 30 days of that public notice date will be considered part of a filing group, and competitive bidding procedures will be used to select among them.[619] Any mutually exclusive initial application that is filed after the 30-day cut-off date will be unacceptable for filing and dismissed. In processing the mutually exclusive filing group, the applicant who submits the winning bid will have its application granted (if the applicant is found by the Commission to be qualified); all other applications will be dismissed.

329. We believe that it is generally advantageous to allow the filing of competing applications, thereby permitting two or more qualified applicants to be considered. Competitive bidding will ensure that the qualified applicant who places the highest value on the available spectrum will prevail in the selection process. We doubt, as PageNet suggests, that successful auction applicants will have filed competing applications unless they were ready and willing to build their proposed facilities. Further, although PageNet is correct that any processing procedure ultimately eliminates qualified applicants, we believe that the use of filing windows increases competitive opportunities and allows more qualified applicants to be considered. Finally, we do not think that we should use filing window and competitive bidding procedures only for newly allocated services such as PCS, as PageNet suggests, because new opportunities to provide service exist in established services as well. Thus, the same objectives would be served by using notice and cut-off procedures and competitive bidding in established services.

b. Part 22 Services

(1) *Background and Pleadings*

330. The *Further Notice* tentatively concluded that initial applications and certain major modifications in Part 22 services, except cellular unserved area Phase I applications, should be subject to 30-day filing windows and competitive bidding procedures used to choose among mutually exclusive applicants.[620] Although for most Part 22 services this procedure would represent a change from the 60-day filing windows currently used, we viewed 30 days notice as adequate for competitors to file mutually exclusive applications.

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[618] *See* discussion in paras. 354-359, *infra*, regarding initial and modification applications.

[619] *See* paras. 363-367, *infra*, regarding the processing of mutually exclusive initial and modification applications.

[620] *Further Notice*, 9 FCC Rcd at 2888-89 (para. 123).

Cellular unserved area Phase II applications would change from first-come, first-served to a 30-day window because we saw no reason to treat those applications differently than other Part 22 licensees. We proposed to continue the one-day filing window for cellular unserved area Phase I applications because those applications are accepted on a date certain that any potential applicant can determine well in advance of the filing window.

331. The commenting parties support adoption of a 30-day filing window for most Part 22 services,[621] except that most parties oppose its use for cellular unserved area Phase II applications. GTE contends that a 30-day window will delay the initiation of service.[622] Both GTE and McCaw argue that a 30-day window for these applications will increase the likelihood that speculative applications will be filed.[623] CECR concurs, arguing that if the objective is to reduce the likelihood of frivolous competing applications, first-come, first-served procedures would be a more efficient way to reduce the number of frivolous applications since competing applications generally would be less likely.[624] BellSouth, on the other hand, supports a 30-day window for Phase II applications because first-come, first-served rules hinder the filing of legitimate competing applications by incumbent carriers seeking to expand their service areas.[625] CECR also claims that our concern that first-come, first-served procedures would eliminate qualified applicants contradicts our finding in the cellular unserved area rule making that most applicants' proposals are "similar with respect to areas and population to be served. Their differences, if any, are of degree and not kind. . ."[626] CECR suggests that our proposal for a 30-day window for Phase II applications is

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[621] *See, e.g.*, BellSouth Comments at 16-17 (supporting the general proposal because a 30-day filing window provides parties with notice of an application that may adversely affect their business plans and provides an opportunity to file competing applications).

[622] GTE Comments at 14-15.

[623] *Id.*; McCaw Comments at 36.

[624] CECR Comments at 2.

[625] BellSouth Comments at 17. BellSouth asks us to clarify that 30-day filing windows will not be created for cellular major modification applications. *Id.* Under our recently adopted revisions to Part 22, most major modifications to cellular systems do not trigger a 30-day notice and cut-off. *See, e.g.*, Section 22.947 (five-year build-out period for initial cellular systems in a market), Section 22.949(a) (Phase I cellular unserved area modification applications). Major modifications to systems awarded under Phase II cellular unserved area procedures, however, would be subject to a 30-day notice and cut-off. *See, e.g.*, Section 22.123(g)(2)).

[626] CECR Comments at 3, *citing* Amendment of Part 22 of the Commission's Rules To Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and To Modify Other Cellular Rules, CC Docket No. 85-388, First Report and Order and Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 6185, 6217 (1991) (*Cellular Unserved Areas Order*).

intended to maximize revenue, which is prohibited by Sections 309(j)(7)(A) and 309(j)(7)(B) of the Communications Act.

(2) *Discussion*

332. We will adopt 30-day notice and cut-off procedures for all CMRS governed by Part 22, except cellular unserved area Phase I applications, and we will use competitive bidding to select among mutually exclusive initial applications, as described in paragraphs 355-356, *infra*.[627] These procedures are supported by the record developed in this proceeding and will further our public interest goals of ensuring that all qualified applicants have an opportunity to compete for a license, and deterring the submission of speculative applications.

333. We believe that our decision to change cellular unserved area Phase II applications from first-come, first-served procedures to a 30-day notice and cut-off will allow all unserved area licensing to be conducted on a level competitive field even though the specific mechanism used for each phase is different. Any prospective applicant for Phase I can determine well in advance when the one-day filing window will occur because it is a date certain known to all potential competitors in advance. Thus, there is ample opportunity to file competing applications on the same day. First-come, first-served procedures by their very nature significantly decrease the possibility for competition among qualified applicants. A 30-day notice and cut-off, by contrast, provides essentially the same benefit to all similarly situated potential Phase II applicants as the Phase I procedure provides to earlier unserved applicants.[628] Although GTE is correct that a 30-day notice and cut-off may delay the initiation of service, we conclude that the benefits to be gained by using a 30-day notice and cut-off for Phase II outweigh this concern. Further, we have developed a competitive bidding system that allows us to award licenses expeditiously, thus avoiding unnecessary delays in initiating service.

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[627] Because we previously determined that Rural Radio Service, including Basic Exchange Telecommunications Service (BETRS), are fixed services and thus not CMRS, our decisions here regarding application filing and processing procedures do not apply to these services. *See CMRS Second Report and Order*, 9 FCC Rcd at 1454-55 (para. 102).

[628] We disagree with CECR's assertion that our desire to include more qualified applicants for consideration contradicts an earlier finding in the unserved area rule making. The passage cited by CECR explains why we declined to adopt comparative hearings, rather than random selection procedures, to choose among mutually exclusive applicants. It does not argue for eliminating qualified applicants from consideration. *See Cellular Unserved Area Order*, 6 FCC Rcd at 6217 ("[T]he comparative hearing process is ill suited for comparing substantially similar cellular system designs. We will revisit our decision to use lotteries for unserved area applications if we receive Congressional authority to conduct auctions.") (citations omitted).

334. Unlike random selection procedures, which tend to increase the likelihood of speculative or frivolous applications because all competitors have an equal opportunity to receive an authorization, the use of competitive bidding procedures should not have the same result,[629] even if a 30-day notice and cut-off is used. We also disagree with CECR's suggestion that our primary motivation for proposing a 30-day window is to increase revenues through the use of competitive bidding. Rather, we believe that a 30-day notice and cut-off procedure produces equitable results in licensing cellular unserved areas, as discussed above.

c. 900 MHz SMR

(1) *Background and Pleadings*

335. In the *Further Notice* we tentatively concluded that we should use filing windows and competitive bidding procedures in future 900 MHz licensing, because it seemed likely that there would be a large number of mutually exclusive applications if we decided to license outside the 46 Designated Filing Areas, as proposed in the *900 MHz Phase II Notice.*[630]

336. E.F. Johnson supports the proposal because 900 MHz licenses still need to be granted in many areas.[631] AMTA states that competitive bidding procedures may be appropriate for licensing 900 MHz SMR systems if the Commission creates opportunities for regional or national 900 MHz SMR networks.[632]

(2) *Discussion*

337. We adopt our proposal to establish notice and cut-off and competitive bidding for future 900 MHz licensing. As with Part 22 services, we will use 30-day notice and cut-off for filing applications. These procedures will permit all qualified applicants to file applications. Moreover, because we anticipate a large number of mutually exclusive wide-area applications in future licensing of this service, the use of competitive bidding to select among them will ensure that the qualified applicants who place the highest value on the

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[629] *E.g.*, *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2385 & n.158.

[630] *Further Notice*, 9 FCC Rcd at 2889 (para. 125), *citing* Amendment of Parts 2 and 90 of the Commission's Rules To Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, First Report and Order and Further Notice of Proposed Rule Making, 8 FCC Rcd 1469 (1993) (*900 MHz Phase II Notice).*

[631] E.F. Johnson Comments at 23.

[632] AMTA Comments at 39-40.

available spectrum will prevail in the selection process. These procedures will apply to all future applicants in this service, whether they are regulated as CMRS or PMRS until August 1996.[633]

d. 800 MHz SMR

(1) *Background and Pleadings*

338. The *Further Notice* sought comment on whether we should use filing windows and competitive bidding for future licensing of 800 MHz SMR frequencies.[634] We noted that the *800 MHz EMSP Notice*[635] had proposed to establish a filing window for existing licensees to apply for wide-area authorizations within their MTAs and BTAs, with mutually exclusive applications designated for random selection procedures. After the initial licensing phase, we proposed that subsequent mutually exclusive applications be processed on a first-come, first-served basis, with same-day applications treated as mutually exclusive. The *Further Notice* sought comment on whether the proposed procedures continued to be viable, particularly in light of the amount of licensing that has subsequently occurred in the 800 MHz band. We noted that the viability of the proposed procedures might depend on whether requests for wide-area authorizations by existing licensees were considered to be initial applications or modification applications for competitive bidding purposes.

339. AMTA and RMR support the continued use of first-come, first-served procedures for 800 MHz licensing because only a limited amount of unassigned spectrum is available for new licensing.[636] AMTA maintains that since most wide-area licensing in these frequency bands now consists of consolidations, it is questionable whether the statutory criteria for using competitive bidding can be satisfied for these transactions.[637] E.F. Johnson supports first-come, first-served procedures unless licensees could apply for large spectrum blocks.[638]

340. NABER suggests that a 30-day filing window be used for the 861-865 MHz band, but that first-come, first-served procedures continue to be used for the 851-860 MHz

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[633] *See* note 659, *infra.*

[634] *Further Notice*, 9 FCC Rcd at 2889 (para. 126).

[635] Amendment of Part 90 of the Commission's Rules To Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Notice of Proposed Rule Making, 8 FCC Rcd 3950 (1993) (*800 MHz EMSP Notice*).

[636] AMTA Comments at 39-40; RMR Comments at 7 (unpaginated).

[637] AMTA Comments at 40.

[638] E.F. Johnson Comments at 22-23 & n.19.

band.[639] NABER argues that, because both CMRS and PMRS licensees are eligible to operate in the 851-860 MHz band, the use of filing windows and competitive procedures would effectively delay the processing of PMRS applicants pending completion of CMRS processing and, thus, first-come, first-served procedures are appropriate instead.

(2) *Discussion*

341. As discussed in paragraphs 103-105, *supra*, we will propose adopting two different licensing schemes for the 800 MHz frequency band. The upper band with 200 channels of contiguous spectrum will be licensed on a wide-area, multi-channel basis, whereas 80 channels of lower band spectrum will continue to be licensed on a channel-by-channel, station-by-station basis. Under both schemes, we would open the application process to any qualified applicant.[640] Thus, there would be competitive opportunities to provide SMR service in this frequency band. Consequently, we conclude that we should adopt 30-day notice and cut-off and competitive bidding procedures, for selecting among mutually exclusive initial applications in the 800 MHz band. The use of these procedures will not exclude qualified applicants from consideration, and, because the number of mutually exclusive applications in future licensing may be considerable, the use of competitive bidding to select among them will ensure that the qualified applicants who place the highest value on the available spectrum will prevail in the selection process.

342. We do not agree with NABER that, because both CMRS and PMRS applicants may apply in the 851-860 MHz band, we should use first-come, first-served procedures in order to avoid subjecting PMRS applicants to the delay caused by filing windows and auctions. We believe that the public interest benefits of permitting all qualified applicants to seek licenses in this frequency band outweigh the potential delay in the award of these authorizations. Moreover, we are confident that use of competitive bidding procedures will not lead to unreasonable delays in the issuance of these licenses.

e. 220 MHz

(1) *Background and Pleadings*

343. The *Further Notice* did not propose any changes to our 220 MHz first-come, first-served filing procedures.[641] We noted that licensing of commercial nationwide channels is essentially complete. For local 220 MHz channels, we sought comment on whether there

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[639] NABER Comments at 42-43.

[640] We note that we are suspending the acceptance of 800 MHz applications on the 280 SMR category channels, as of August 9, 1994, pending the adoption of wide-area licensing rules. *See* para. 108, *supra.*

[641] *Further Notice,* 9 FCC Rcd at 2889 (para. 127).

are alternative procedures that would allow reasonable opportunities for CMRS applicants to file competing applications without limiting the availability of frequencies to potential PMRS applicants. We also asked whether we should amend our procedures if we adopt regional licensing of 220 MHz channels, as requested in a pending petition.

344. Simrom notes that, because of a filing freeze on 220 MHz applications, most licensees who have relocated stations have done so under special temporary authority (STA). Simrom suggests that modification applications to cover those relocated facilities be accepted prior to accepting for filing applications for new stations.[642]

(2) *Discussion*

345. Commenters in this proceeding have raised a number of concerns about the status of facilities being constructed or operating under STAs and future licensing in this service. As discussed in Section III.C.1.a.4, *supra*, we intend to initiate a proceeding in the near future to address the issue of revising our 220 MHz service area and channel assignment rules. We believe that many of the licensing issues raised by commenters should be addressed in the context of this future proceeding. We will therefore defer the adoption of new application filing and selection procedures for 220 MHz service at this time.

f. 929-930 MHz Paging

(1) *Background and Pleadings*

346. We proposed in the *Further Notice* to defer the issue of mutually exclusive application procedures for 929-930 MHz paging because we tentatively concluded that these issues should be comprehensively addressed after the pending reconsideration of the *900 MHz PCP Exclusivity Order*[643] is completed.[644] Nonetheless, we emphasized that our ultimate objective is to adopt consistent licensing procedures for all CMRS paging applicants. The proposal is generally supported by the record.[645] AmP, however, supports the use of auctions

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[642] Simrom Comments at 17-18; *accord* E.F. Johnson Comments at 23; AMTA Reply Comments at 25; Global Reply Comments at 5. Simrom suggests that modification applications should be accepted before the current December 4, 1994, construction deadline.

[643] Amendment of the Commission's Rules To Provide Exclusivity to Qualified Private Paging Systems at 929-930 MHz, PR Docket No. 93-35, Report and Order, 8 FCC Rcd 8318 (1993) (*900 MHz PCP Exclusivity Order*), *recon. pending*.

[644] *Further Notice*, 9 FCC Rcd at 2889-90 (para. 128).

[645] *See, e.g.*, APACG Comments at 15.

to select among mutually exclusive initial applications, provided the applications specify the desired frequency.[646]

(2) *Discussion*

347. We will defer a decision on modifying the application filing and processing procedures for 929-930 MHz paging pending completion of reconsideration of the *900 MHz PCP Exclusivity Order*. As we noted in the *Further Notice*, we are now in the first phase of implementing local, regional, and nationwide licensing in these frequency bands.[647] Although we have not formally created wide-area licenses for 929-930 MHz paging, the issue of whether we should adopt market-based licensing has been raised for the 931 MHz paging service licensed under Part 22, and we have expressed our interest in pursuing such a licensing scheme.[648] We emphasize again that our ultimate objective is to adopt consistent licensing procedures for all CMRS paging applicants. Thus, there are several issues related to 900 MHz paging services under both Part 90 and Part 22 that we are interested in addressing comprehensively in further proceedings.

7. *Amendment of Applications and License Modifications*

a. Definitions

(1) *Background and Pleadings*

348. Under Section 309 of the Communications Act, major amendments to common carrier applications in Part 22 services must be placed on 30-day public notice and are subject to petitions to deny in the same manner as initial applications. Major amendments in Part 22 services also are subject to competing applications filed within the relevant filing window. All amendments not classified as major are considered minor and are not subject to the public notice or cut-off rule requirements. Applications to modify licenses are classified under the same terms as amendments to applications. That is, proposals to modify a license that would be considered major amendments to an initial application must be placed on public notice and are subject to petitions to deny, while minor modifications are exempt from these requirements.

349. All major amendments to CMRS applications in Part 90 services also must be placed on public notice and are subject to petitions to deny, pursuant to Section 309. For these purposes, the *Further Notice* proposed to apply the same definitions of ''major'' and ''minor'' amendments and modifications to Part 90 CMRS applications that are applicable to

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[646] AmP Reply Comments at 5.

[647] *Further Notice*, 9 FCC Rcd at 2889-90 (para. 128).

[648] *Part 22 Rewrite Order*, at para. 11.

Part 22 services.[649] In the *Further Notice*, we noted that in the *Part 22 Rewrite Notice* we had proposed to revise the Part 22 rules to define major and minor filings on a service-by-service basis, and we asked whether we should adopt a similar approach in the relevant Part 90 services as well. We also noted that in the *Part 22 Rewrite Notice* we had proposed to define initial applications for 931 MHz paging as (1) applications proposing the location of a facility more than 2 kilometers from any existing facility operating on the same frequency, or (2) applications proposing locations anywhere on a new frequency. We asked whether, if we decided to implement these definitions in Part 22, the definitions for major and minor filings should be the same for any Part 90 and Part 22 services we may determine to be substantially similar in this proceeding.

350. The record generally supports our proposal to apply the same definitions of ''major'' and ''minor'' amendments and modifications to Part 90 CMRS filings that are applicable to Part 22 filings.[650] PCIA suggests that all CMRS licensees should only be required have to submit the information being modified, which is the practice for Part 22 services, and not all of the information associated with the affected call sign, as is now done with Part 90 services.[651]

351. The record is divided on what types of system changes should be classified as major and minor amendments and modifications, although most commenters recognize that services licensed on a station-by-station basis present different concerns than those licensed on a wide-area basis. For example, Southern recommends that major amendments be defined as those which affect adjacent or co-channel licensees where station-by-station licensing is used.[652] Some commenters suggest that, to the greatest extent possible, we adopt broad definitions of ''minor'' amendments to pending applications and allow CMRS licensees to make ''minor'' modifications to existing facilities on a permissive basis, which would not even require the filing of notifications.[653] In particular, many commenters view the proposals in the *Part 22 Rewrite Notice* for defining initial applications in the 931 MHz paging service as too broad, and some suggest that the proposed system changes should be treated as modification applications, not initial applications. For example, PageNet claims that, because of the need to comply with Section 309 of the Act, the result of such broad definitions for initial applications would be substantial delay and expense in developing systems. PageNet believes that additional base stations operating on the same frequency that are within a

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[649] *Further Notice*, 9 FCC Rcd at 2890 (para. 131).

[650] *See, e.g.*, AMTA Comments at 41; APACG Comments at 15; Motorola Reply Comments at 16.

[651] PCIA Comments at 30-31.

[652] Southern Reply Comments at 11-12.

[653] PCIA Comments at 30; McCaw Comments at 36-37; RMD Comments at 12-13.

licensee's existing service area should not be treated as initial applications or major filings.[654] Simrom argues that the primary concern in defining system modifications should be that the existing and proposed facilities can be operated as an integrated system, which is achieved when the predicted, reliable service contours of both facilities meet. Thus, Simrom suggests, a license modification should be based on a distance twice the expected reliable service contour for base stations licensed at maximum height and power, not 2 kilometers.[655] The composite service contours for these modifications would be based on those stations operated by licensees under substantially common ownership or as part of an integrated system.

352. In addition, Simrom suggests several other definitional changes: (1) for two-way systems, the addition of a frequency in the same frequency band which can be used for the same purposes should be treated as a modification, not an initial application; (2) certain major modifications should not be treated as newly-filed, as is done under Sections 22.23(g)(2), 22.23(g)(3), 22.23(g)(4), and 22.23(g)(6); and (3) for 220 MHz licensees, sites that are authorized under STAs should be deemed as authorized sites under the initial licenses, thereby precluding the need for major modifications of the initial licenses.[656]

353. Finally, PageNet questions whether changes in ownership and control should expose a licensee to new petitions to deny or competing applications, since anyone who wanted to file for the channel or channels affected by the transfer or assignment application would have had an opportunity to do so earlier during initial licensing.[657]

(2) Discussion

354. We will adopt the same or similar definitions for initial applications and major and minor amendments and modifications for all commercial mobile radio services in Part 22 and Part 90, to the extent practicable. For Part 90 services, the definitions will be service specific, consistent with the approach we have taken with Part 22.[658] In addition, we recognize, as do the majority of the commenters, that the definitions must account for differences in market-based and station-by-station licensing schemes. This result, which is

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[654] PageNet Comments at 40-41; *accord* Geotek Comments at 12 (licensees should be allowed to add internal base stations without filing modification applications).

[655] Simrom Comments at 19-23. Simrom would adopt the 2 kilometer distance for amendments to pending applications, however, so that the information could appear on public notice. *Cf.* PageNet Reply Comments at 11 (initial applications should be for sites which do not overlap the contours of any existing facility, *e.g.*, more than 20 miles).

[656] Simrom Comments at 19-23 (*citing* current rules).

[657] PageNet Comments at 41.

[658] *Part 22 Rewrite Order*, Appendix A (discussion of Section 22.123).

supported by the record developed in this proceeding, has certain benefits. The use of consistent definitions for initial applications, which we have determined will be subject to 30-day notice and cut-off and competitive bidding procedures, will level the competitive field for substantially similar commercial services. Thus, all qualified applicants for substantially similar commercial services will be considered for a license, and the one who places the highest value on the available spectrum will prevail in the selection process. Similarly, consistent definitions for amendments and modification applications will result in similar system proposals and modifications for substantially similar services being treated equally.

355. Initial CMRS applications in both Part 22 and Part 90 that are licensed on a market or geographically-defined basis are those that propose to construct and operate a new system in the relevant service, with some qualifications. In the cellular service, licensees of existing cellular systems within an MSA or RSA who apply for unserved area licenses within the same market are filing initial applications for that unserved area, not modification applications, if they intend to integrate facilities constructed within the unserved area with their existing system. Similarly, licensees of existing SMR systems who apply for MTA licenses that encompass their existing facilities are filing initial applications, not modification applications, in those areas. Under this approach, existing cellular and SMR licensees in a market will have to compete with other qualified applicants for the license to extend service to other parts of the market and competitive bidding will be used to select among competing applicants.[659]

356. In the case of Part 22 and Part 90 services that are licensed on a station-by-station basis, we will adopt the same definition of initial application that we have adopted for 931 MHz paging services in Part 22:

(1) Applications proposing transmitter locations anywhere on a new frequency, unless the additional channel is for paired two-way operation, is in the same frequency range as the existing channel, and will be operationally integrated with the existing channel (as Simrom suggests);[660] and

(2) Applications proposing the location of a facility more than 2 kilometers from any existing facility licensed to the applicant and operating on the same frequency.[661]

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[659] We note that treating existing SMR licensees' applications for MTA licenses in this manner does not affect our determination that existing licensees in the service will continue under private mobile radio regulation until August 1996. *See CMRS Second Report and Order*, 9 FCC Rcd at 1513-14 (paras. 280-284).

[660] By definition, this category includes applications for new systems, *i.e.*, the first station licensed to the applicant in the service, as well as the addition of a new channel to a facility already licensed to the applicant.

[661] *Part 22 Rewrite Order*, at para. 105.

Applications that meet these criteria will be subject to 30-day notice and cut-off and competitive bidding procedures. We recognize that the majority of these applications will be to expand or to develop additional capacity for existing systems. Where we employ station-by-station licensing, there may be numerous licensees in a given geographic area competing for use of the same channel as they seek to expand their capacity or service areas. We believe that these proposals are essentially new ventures and that applicants should be subject to competitive forces -- *i.e.*, all qualified applicants should be considered and the one who values the use of the spectrum most highly will prevail in the selection process. We believe that the benefits to be gained from this approach outweigh some commenters' concerns that substantial delay and expense will befall licensees. Consequently, we decline to adopt Simrom's suggestions that expansion applications be defined as modification applications based on a service contour distance formula.[662]

357. As for amendments to pending applications and applications to modify licenses, Part 90 CMRS applications will generally follow the principles established in the rules for Part 22 services.[663] Specific rules for Part 90 services reflect the unique technical and operational requirements of those services, as is the case for Part 22 services. Major amendments include those involving: (1) a change in the channel, (2) an increase in the effective radiated power or antenna height above average terrain in any azimuth, (3) a change in location, or (4) a substantial change in the technical proposal from that which was coordinated with other users. Major modification applications include those seeking an increase in the effective radiated power or antenna height above average terrain in any azimuth. Amendments and modification applications that would not be classified as major are classified as minor. We decline to adopt Simrom's suggestion that, for certain major amendments or modifications, we adopt numerous exceptions to the cut-off rules so that these filings would not be treated as newly-filed. We recently adopted new rules for Part 22 which have eliminated many of these former exceptions, although some of them have been retained.[664]

358. As we explained in the *Further Notice*, under Section 309 all major filings are subject to a 30-day public notice period and petitions to deny. This would include initial applications, major amendments, and major modification applications, as described above. Filings for substantial changes in ownership or control, *de jure* or *de facto*, are also major under Section 309 and subject to its requirements, but they are not subject to competing applications.

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[662] *But see* discussion in paras. 370-373, *infra*, regarding additional stations operating on the same frequency that are within a licensee's existing service area.

[663] *Part 22 Rewrite Order*, Appendix A (discussion of Sections 22.123 and 22.163).

[664] *See, e.g., Part 22 Rewrite Order*, Appendix A (discussion of Section 22.123).

359. As for 220 MHz service, we do not make any decisions here on how to define initial applications and major and minor amendments and modifications. As discussed in paragraph 345, *supra*, we will addresses these issues in a future rulemaking proceeding on the 220 MHz service. Finally, to the extent practicable, we will implement PCIA's suggestion that CMRS licensees only submit the license information being modified, not all of the information associated with the affected call sign. This will ease the paperwork burden on licensees and the Commission.

b. Mutual Exclusivity

(1) Background and Pleadings

360. The *Further Notice* sought comment on whether the definitions of "major" filings should dictate whether competitive bidding may be used when an application to modify an existing CMRS license is mutually exclusive with another application.[665] We suggested, consistent with our decision in the *Competitive Bidding Second Report and Order*, that competitive bidding could be used in exceptional cases where a major modification would fundamentally alter the nature or scope of the licensee's system. The *Further Notice* also stated that, to the extent we decide that modification applications should be deemed not suitable for competitive bidding in mutually exclusive situations, we tentatively concluded that first-come, first-served filing procedures should be used to limit the likelihood of competing applications being filed.[666] Under this approach, only competing applications filed on the same day as a modification application would be treated as mutually exclusive, and the grantee would be chosen by random selection or a comparative selection process.[667]

361. Several commenters argue that a major amendment to a pending application should not be subject to competitive bidding if the underlying application has already been subject to competitive bidding.[668] The record is split on how to treat mutually exclusive modification applications. Although some commenters believe that competitive bidding should not be used for any mutually exclusive modification application,[669] the majority of commenters are concerned about the processing of applications to expand existing systems, which have traditionally been treated as modification applications, particularly in those services which do not have market-based licensing. AMTA supports the use of competitive bidding for mutually exclusive modification applications in highly unusual situations, where

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[665] *Further Notice*, 9 FCC Rcd at 2890-91 (para. 132).

[666] *Id.* at 2891 (para. 133).

[667] *Id.*

[668] *See, e.g.*, Celpage Comments at 28; RAM Tech Comments at 27.

[669] *See, e.g.*, Celpage Comments at 28; RAM Tech Comments at 27.

the modification fundamentally alters the nature or scope of the service.[670] APACG favors the broad use of competitive bidding for mutually exclusive expansion applications, arguing that the expansion site will likely prove more valuable to the established carrier than to a newcomer.[671] Other parties, such as PageNet, argue that treating expansion applications as major filings or initial applications and subjecting them to competitive bidding will add substantial delay and expense to the licensing process, thereby hampering system expansion.[672] PageNet argues for the use of frequency-specific applications, first-come, first-served filing procedures, and wide-area licensing for 931 MHz services.[673] AmP would allow a licensee to file modification applications competing with initial applications of new entrants proposing co-channel facilities adjacent to the interference contours of the licensee's system, and supports using competitive bidding to resolve any mutually exclusive situations.[674]

362. In the 220 MHz service, some commenters believe that the Commission should adopt procedures to avoid mutual exclusivity between initial applicants and licensees operating pursuant to STAs that wish to modify their authorizations to cover existing operations. USM submits that the freeze on 220 MHz initial applications should be maintained until after licensees are given a reasonable time to file modification applications to improve existing systems, thereby avoiding conflicts between the two classes of applicants.[675]

(2) Discussion

363. For the reasons discussed below, we conclude that mutually exclusive initial applications will be subject to competitive bidding procedures. Modification applications will be accepted for filing on a first-come, first-served basis, and only those mutually exclusive modification applications filed on the same day will be entitled to comparative consideration. As for 220 MHz service, we do not make any decisions here on filing or selection procedures for modification applications. As discussed in paragraph 345, *supra*, we will address these issues in a future rule making proceeding regarding 220 MHz service.

364. The majority of commenters are concerned about the filing and processing of applications to modify existing systems. As discussed in paragraphs 355-356, *supra*, the

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[670] AMTA Comments at 42.

[671] APACG Comments at 16.

[672] PageNet Comments at 35.

[673] PageNet Reply Comments at 8-9.

[674] AmP Reply Comments at 6.

[675] USM Comments at 11-13; *accord* AMTA Comments at 23-24.

definition of ''initial application'' that we are adopting covers the major types of changes for expanding existing systems, and we believe that significant benefits will result from adopting such a broad definition. These initial applications will be subject to 30-day notice and cut-off, and mutually exclusive applications will be processed using competitive bidding.

365. Although certain modification applications -- *e.g.*, increases in tower height or power -- may also result in expansion of a service area, we do not believe that significant benefits would be gained by using competitive bidding to select among mutually exclusive modification applications in these cases. First, as we explained in the *Further Notice*, we have previously concluded that competitive bidding generally should not be used for modification applications, given the legislative history of Section 309(j).[676] Second, the types of changes involved are generally subject to adjustment, thus enabling licensees to avoid causing interference to other co-channel operations. Consequently, we believe that these types of modifications would be processed more efficiently if we accept them for filing on a first-come, first-served basis. Only modification applications that are mutually exclusive and that are filed on the same day will be entitled to comparative consideration. In those cases, we will encourage the parties to negotiate a settlement and, if this approach is not successful, we will designate the applications for comparative hearing.

366. We recognize that it also is possible for modification applications to be mutually exclusive with initial applications. Because these categories of applications are subject to different types of filing and processing procedures, mutually exclusive situations will be resolved as follows. If the modification application is filed first, it effectively cuts off any subsequently filed application, whether an initial or a modification application. A different result will occur, however, if the modification application is filed after an initial application (in cases in which the initial application has triggered a 30-day cut-off period for competing applications). In this case, the modification application will be considered part of the mutually exclusive filing group, and the whole filing group will be entitled to comparative consideration. The presence of the modification application in the group, however, will preclude the use of competitive bidding. In these cases, we will encourage the parties to negotiate a settlement and, if this approach is not successful, we will designate the applications in the filing group for comparative hearing.

367. Major amendments to pending applications raise concerns among some commenters regarding the manner in which the filing of such amendments would affect the competitive bidding process. Generally, major amendments are treated in the same manner as initial applications regarding public notice, petitions to deny, and competing applications. When applications have already gone to competitive bidding, major amendments that are filed after that process is completed will be considered newly-filed applications that may not be resubmitted after applicable filing deadlines.[677]

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[676] *Further Notice*, 9 FCC Rcd at 2890-91 (para. 132).

[677] *See* 47 CFR § 1.2105(b)(2).

c. Minor Modifications

(1) Background and Pleadings

368. The Part 22 rules allow numerous minor modifications to existing systems to be made on a permissive basis, often without requiring notification to the Commission.[678] In the *Further Notice*, we proposed to conform the Part 22 and Part 90 rules to the fullest extent practicable to allow Part 90 licensees to make permissive changes to their systems on the same basis as Part 22 licensees, particularly where such changes relate to the internal configuration of wide-area systems and do not have an impact on adjacent licensees.[679] Under current rules, Part 90 licensees must seek Commission approval on a station-by-station basis for numerous technical changes.

369. The record generally supports the proposal.[680] For example, Geotek asserts that 900 MHz licensees should be allowed to build out their systems within their service area boundaries and not be subject to competing applications.[681] Comcast, however, suggests that even if we do not require licensees to notify us of the addition or modification of internal cell sites, we should require licensees to provide information regarding internal cell sites to adjacent system operators so that they can evaluate for themselves the interference potential of cells close to the service area border.[682] AmP supports treating a paging fill-in transmitter (*i.e.*, a new base station whose reliable service contour is at least 50 percent encompassed by the contours of one or more existing or authorized stations in the system) as a permissive modification or a minor modification subject to first-come, first-served filing procedures, so that established licensees may expand to meet their customers' needs.[683] In addition, RAM Tech and Celpage suggest that the relocation of a control station, which is now treated as a major modification, should be treated as a minor modification or as a permissive change, so long as it can be accomplished without causing harmful interference to other stations.[684] RAM Tech points out that base stations associated with the control station may be moved under minor modification rules, and treating relocations of control stations as major modifications causes delay.

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[678] *See Part 22 Rewrite Order*, at paras. 22-28.

[679] *Further Notice*, 9 FCC Rcd at 2891 (para. 134).

[680] *See, e.g.*, Nextel Comments at 46; PageNet Comments at 40; PCC Comments at 13-14; Southern Comments at 12-13.

[681] Geotek Reply Comments at 12.

[682] Comcast Reply Comments at 9-10.

[683] AmP Reply Comments at 4-5.

[684] RAM Tech Comments at 27; Celpage Comments at 28.

(2) Discussion

370. We will allow minor modifications to existing CMRS systems in Part 90 services to be made on a permissive basis, to the extent practicable. For example, in the case of SMR licenses granted for a defined geographic area, we will allow the licensee to add new facilities within the MTA without filing additional applications or notifying us that construction is completed. This is consistent with procedures for cellular systems under Part 22. We will not adopt Comcast's suggestion, however, that we require licensees operating under these procedures to provide information regarding internal cell sites to adjacent system operators. By definition, internal cells are those which operate completely within the licensee's service area boundary and do not modify it.[685] Thus, it is extremely unlikely that an internal cell would cause interference to an adjacent system operator. If such a result did occur, the cell would no longer be covered under the existing authorization as a permissive change, and the licensee would be obliged to seek permission to operate the facility.

371. We recognize that the record supports allowing permissive changes for Part 90 services. However, some Part 90 services which are licensed on a station-by-station basis and which do not use protected service contours, as is done in Part 22 services, will be allowed few types of permissive system changes at this time. For example, 931 MHz paging licensees in Part 22 may add a fill-in transmitter (*i.e.*, the service area and interfering contours of the additional transmitter are totally encompassed by the composite service area contour and predicted interfering contour, respectively, of the existing station on the same channel) without applying for permission or notifying the Commission of operation.[686] The concept of fill-in transmitters does not apply to Part 90 services that do not have protected service contours and, thus, this type of permissive change will not be adopted for those Part 90 services.

372. There are several suggestions for permissive changes that we decline to adopt. We will not expand the definition of a fill-in transmitter to allow a 50 percent overlap of the reliable service contour, as AmP suggests, because this would be inconsistent with our earlier finding that system expansion should generally be subject to competitive forces.[687] Finally, we will not adopt the suggestion that relocation of a control station be treated as a minor modification or a permissive change because the increase in the number of these types of stations has resulted in increased instances of interference between stations; thus, co-channel operators should have notice of a proposed control station relocation and the opportunity to petition to deny the application.

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[685] *See, e.g.*, 47 CFR § 22.165.

[686] *See id.*

[687] *See* discussion of initial application at paras. 355-356.

373. As for 220 MHz service, we do not make any decisions here regarding how to define minor amendments and modifications. As discussed in paragraph 345, *supra*, we will address this issue in a future rule making proceeding regarding 220 MHz service.

8. *Conditional and Special Temporary Authority*

a. Pre-Grant Construction

(1) *Background and Pleadings*

374. As we explained in the *Further Notice*, our existing procedures under Part 22 and Part 90 set forth somewhat different requirements for construction and temporary operation by an applicant prior to the formal grant of a license. Under Part 22, applicants are generally prohibited from commencing construction or operating facilities prior to the license grant.[688] An applicant, however, may begin construction prior to the grant on a conditional basis if no petitions to deny or mutually exclusive applications have been filed and the application meets certain other criteria.[689] Under Part 90, there is no restriction regarding the time at which an applicant may commence construction, provided that the applicant does not begin operating its service prematurely, which would be in violation of the rules.[690]

375. In the *Further Notice*, we tentatively concluded that the same rules for pre-grant construction and operation should apply to CMRS applicants under both Part 22 and Part 90. With respect to pre-grant construction we sought comment on whether the current restrictions applicable to Part 22 applicants should be adopted for all CMRS applicants. Alternatively, we sought comment on whether CMRS licensees should be able to commence construction at any time, provided that they comply with relevant environmental and aviation hazard rules.[691]

376. Many commenters agree that the same rules for pre-grant construction should be adopted for Part 90 and Part 22 CMRS applicants. These commenters argue that the Commission should adopt liberal pre-grant construction rules permitting applicants to commence construction at any time, provided that they comply with applicable environmental and aviation hazard rules.[692] APACG and PCIA assert that granting applicants authority to

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[688] 47 CFR § 22.143. *See Further Notice*, 9 FCC Rcd at 2891 (para. 135).

[689] *See* 47 CFR § 22.143(d).

[690] *See* 47 CFR § 1.923(a) (no construction permit required in Private Radio Services).

[691] *See Further Notice*, 9 FCC Rcd at 2891-92 (para. 137).

[692] AMTA Comments at 42; APACG Comments at 12; BellSouth Comments at 19; CTIA Comments at 5; E.F. Johnson Comments at 24; GTE Comments at 15; PageNet Comments at 42;

(continued...)

engage in pre-grant construction could materially advance the date on which the public receives service.[693] APACG argues that such rights should not be limited to cases in which no petitions to deny or mutually exclusive applications are on file, and contends that there is no risk in allowing pre-grant construction.[694]

(2) *Discussion*

377. We find that the pre-grant construction rules should be modified so that the same rules apply to Part 90 and Part 22 CMRS applicants. While we favor the adoption of more liberal pre-grant construction rules, we do not believe that CMRS applicants should be able to commence construction without notice. In the *Part 22 Rewrite Order*, we determined that the existing 90-day waiting period for all Part 22 applicants to begin construction is too long and instead adopted a 35-day waiting period.[695] Consistent with that action, we will establish the same 35-day waiting period for all CMRS.

b. Pre-Grant Operation

(1) *Background and Pleadings*

378. Part 22 applicants, as common carriers, are subject to Section 309(f) of the Act, which allows the Commission to grant to a common carrier applicant a special temporary authorization (STA) to operate for up to 180 days without prior public notice under "extraordinary circumstances" where a delay in operations would seriously prejudice the public interest.[696] Because Section 309(f) of the Act does not apply to private radio applicants, requirements under Part 90 for temporary operation prior to licensing are more flexible than under Part 22.[697] Part 90 requirements for applicants seeking STAs for new or

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[692](...continued)
PageNet Reply Comments at 13-14; PCIA Comments at 34 (permit where: (1) carrier agrees to undertake construction at its own risk; (2) FAA regulations have been met or are inapplicable; and (3) environmental regulations have been met or are inapplicable); Pittencrieff Comments at 14; Southern Comments at 13.

[693] APACG Comments at 12; PCIA Comments at 34.

[694] APACG Comments at 12.

[695] *See Part 22 Rewrite Order*, Appendix A (discussion of Section 22.143). With this change, paging and cellular applicants have the same waiting period. Some period is necessary to allow the Commission to determine whether a petition to deny an application was timely filed. The impact of this change is that if a petition to deny is filed, no pre-grant construction would be permitted.

[696] *See* Communications Act, § 309(f), 47 U.S.C. § 309(f). *See also* 47 CFR § 22.125(b).

[697] *See Further Notice*, 9 FCC Rcd at 2891 (para. 136).

modified operations do not require the applicant to establish the existence of "extraordinary circumstances," and may be extended beyond 180 days.[698] Part 90 applicants may also seek temporary and conditional permits to operate prior to the issuance of a license for up to 180 days.[699]

379. In the *Further Notice*, we noted that even if we adopted liberal pre-grant construction rules for CMRS, Section 309(f) requires that a stricter standard be applied to pre-grant operation. We therefore proposed to adopt procedures applicable to reclassified Part 90 applicants that would subject STA requests by such applicants to the same requirements that are applied to similar requests by Part 22 applicants. We also proposed to prohibit any commencement of operations by CMRS applicants without prior Commission authorization.[700]

380. CTIA and E.F. Johnson argue that the Commission should liberally interpret the requirements of Section 309(f) to permit grants of STAs under conditions similar to Part 90 requirements.[701] NABER contends that the Commission has sufficient discretion under Section 309(f) to permit pre-grant operation for applications that have received frequency coordination. NABER argues that since such applications are routinely granted, there is no reason not to permit operation on a conditional basis. NABER proposes a restriction of pre-grant operation to no sooner than 45 days after issuance of a Public Notice as a reasonable safeguard, but asserts that conditional licensing should be expanded to include all applications that have received frequency coordination.[702]

381. PageNet argues that there are two possible alternatives for expediting service to the public. First, contends PageNet, the Commission could apply the conditional permit procedures of Sections 90.195(b) through (h) of the Commission's Rules to all 900 MHz paging applications, since Section 90.159 permits operation only when mutually exclusive applications are not present and after there has been frequency coordination and Federal Aviation Administration (FAA) approval. In the alternative, PageNet asserts that the Commission should adopt the approach taken for point-to-point microwave service, under

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[698] 47 CFR § 90.145.

[699] 47 CFR § 90.159.

[700] *See Further Notice*, 9 FCC Rcd at 2892 (para. 138).

[701] *See* CTIA Comments at 5-6; E.F.Johnson Comments at 24-25. *See also* AMTA Comments at 42 (preferring more flexible Part 90 STA procedures, but unable to see how that approach can be conformed to statutory requirements); Radiofone Reply Comments at 2-3; SEA Reply Comments at 7-8 (Commission should allow STA holders to file applications for modification of their licenses, so that the licenses correspond to the STAs, prior to entertaining applications for new 220 MHz facilities).

[702] NABER Comments at 45-46.

which the Microwave Branch grants blanket STAs to license applicants. PageNet contends that the blanket STA approach is consistent with the Section 309(f) 180-day limitation on STA grants of operating authority and, because the applicant certifies that the grant of blanket STA authority is required to "compete effectively and/or to transact [its] business," the blanket STA authority complies with the Section 309(f) "extraordinary circumstances" requirement.[703]

382. PCIA supports adoption of six-month, company-wide blanket STAs that permit operation of the facilities after the application for facilities is placed on Public Notice. PCIA argues that this procedure has both limited the number of STA requests the Commission staff is asked to process and has afforded carriers greater flexibility in initiating service. In addition, contends PCIA, the Commission is able to review the qualifications of the blanket STA holder. PCIA asserts that similar blanket STA procedures could be implemented for CMRS operation, perhaps to permit operation 40 days after issuance of a Public Notice, to ensure that an application is uncontested.[704] Simrom argues that, as a transitional matter, the Commission should continue to extend existing Part 90 STAs even for licensees immediately classified as CMRS carriers, since in this limited situation, the transition to CMRS regulation will itself be the extraordinary circumstance.[705]

(2) *Discussion*

383. Although several parties favor Commission flexibility in granting STAs, we conclude that Section 309(f) of the Act allows the Commission to grant STAs to CMRS providers who have filed applications subject to the public notice requirements of Section 309(b) of the Act only in extraordinary circumstances involving particular applications. The legislative history of this statutory provision indicates that Congress intended that the Commission would use this authority to abridge the normal process of public notice and comment only in "rare" cases.[706] Consequently, any CMRS provider who has filed an application subject to the public notice requirements of Section 309(b) of the Act will be granted an STA only if the applicant establishes that there are "extraordinary circumstances"

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[703] PageNet Comments at 42-44.

[704] PCIA Comments at 35.

[705] *See* Simrom Comments at 23-24. *See also* Nextel Reply Comments at 39-40 (pending wide-area SMR block licensing the Commission should provide wide area licensee authority to commence commercial operation upon a "notice" filing as allowed for cellular service providers).

[706] *See* Tender Offers and Proxy Contests, MM Docket No. 85-218, Policy Statement, FCC 86-67, 59 Rad. Reg. 2d (P&F) 1536, 1572 (1986), *citing* S.Rep. No. 690, 86th Cong., 1st Sess. 4 (1959); H.R. Rep. No. 1800, 2d Sess. 13 (1960). *See also* Revision of Part 21 of the Commission's Rules, CC Docket No. 86-128, Report and Order, 2 FCC Rcd 5713, 5721 (1987).

where a delay in operations would seriously prejudice the public interest.[707] We note that the Private Radio Bureau, which issues, under delegated authority, common carrier licenses for Part 21 domestic public fixed services,[708] has followed a policy under which, in some cases, applicants for such licenses are granted six-month, company-wide blanket STAs that permit operation of facilities prior to Commission approval. We are not adopting this procedure here.

384. As we discussed in the *Further Notice*, the Part 90 rules regarding CMRS operation under STAs must be conformed to Section 309(f). Thus, Section 90.145 and Section 90.159 of the Commission's Rules will be amended to obligate Part 90 CMRS applicants to comply with the same requirements that are applied to similar requests by Part 22 applicants. We understand that some reclassified PMRS providers possess Part 90 STAs or conditional grants that are currently in effect. Part 90 STAs or conditional grants held by reclassified, grandfathered PMRS providers will expire no later than August 10, 1996, when reclassification as CMRS becomes effective.[709] All existing Part 90 STAs or conditional grants held by reclassified PMRS providers that are not grandfathered shall terminate on the earlier of (1) the scheduled termination date, or (2) 60 days after the effective date of this Order. The Commission will not grant extensions for existing conditional grants.

9. *License Term; Renewal Expectancy*

a. Background and Pleadings

385. We proposed in the *Further Notice* to establish a uniform 10-year license term for all CMRS services, including those in Part 90, which are currently licensed for five years. We also proposed to extend to all CMRS services the existing rules and relevant case law regarding license renewal expectancy.[710] The response to these proposals is unequivocally

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[707] *See* 47 CFR § 22.125(b): "The FCC may grant STAs valid for a period not to exceed 180 days under the provisions of § 309(f) of the Communications Act of 1934, as amended, (47 U.S.C. § 309(f)) if extraordinary circumstances so require, and pending the filing of an application for regular operation. The FCC may grant extensions of STAs for a period of 180 days, but the applicant must show that extraordinary circumstances warrant such an extension." *But see* 47 CFR § 22.125(a), which allows STAs to be granted for 30 or 60 days if no application is pending, consistent with Section 309(c)(2) of the Act. STAs granted pursuant to Section 309(c)(2) apply to both CMRS and PMRS providers.

[708] *See* Certain Processing of Digital Electronic Message Service and Common Carrier Point to Point Microwave to be Transferred to Gettysburg, Public Notice, DA 92-1190 (Sept. 3, 1992).

[709] *See* Budget Act, § 6002(c)(2)(B). *See also CMRS Second Report and Order*, 9 FCC Rcd at 1512-14 (all reclassified paging services and all reclassified private mobile licensees licensed to provide service as of August 10, 1993, are subject to the three-year grandfathering period).

[710] *Further Notice*, 9 FCC Rcd at 2892 (para. 140).

favorable. Virtually every commenter addressing this issue endorses uniform 10-year license terms and accompanying renewal expectancies.[711]

b. Discussion

386. Since the record supports our tentative findings in the *Further Notice* regarding our proposals for CMRS license term and renewal expectancy, they will be adopted. Every Part 90 licensee that is reclassified and treated as a CMRS carrier when its current license term expires shall thereafter have a 10-year license term and be afforded a renewal expectancy, provided it is able to demonstrate that it: (1) has provided "substantial" service during the license term;[712] and (2) has complied with applicable Commission rules and policies, and the Act. The applicable sections of Part 22 governing license terms[713] and renewal expectancy[714] will be incorporated into Part 90.[715] These modifications are essential elements in reaching our goal of achieving regulatory symmetry for all CMRS services.

387. We will also accommodate Pittencrieff's request for a uniform renewal period for all of a carrier's licenses.[716] A CMRS licensee that holds multiple licenses in the same service, which is licensed on a station to station basis, will be allowed to select, upon expiration of the each license term, any date the licensee wishes as the expiration of its new license term, provided the term does not exceed ten years in duration. Consequently, a licensee will be able to tailor its renewal dates to fit its needs. Consolidating license terms should reduce a licensee's processing burdens and reduce the chances of filing errors, arising from a licensee's present need to stay abreast of a multitude of renewal dates.

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[711] *See, e.g.*, AMTA Comments at 42; APACG Comments at 7; BellSouth Comments at 18; Celpage Comments at 29; Dial Page Reply Comments at 7; Geotek Comments at 19; Geotek Reply Comments at 13; GTE Comments at 16; Metrocall Comments at 29; NABER Comments at 46; Network Comments at 29; PageNet Comments at 44; PCIA Comments at 35-36; Pittencrieff Comments at 14-15; RAM Tech Comments at 27-28; Southern Comments at 13; WJG Comments at 9-10.

[712] We have defined "substantial" service to be service that is sound, favorable, and substantially above a level of mediocre service, which would barely warrant renewal. *See* 47 CFR § 22.940(a)(1)(i).

[713] 47 CFR § 22.144(a).

[714] 47 CFR § 22.940.

[715] "Grandfathered" Part 90 licensees, however, because they retain their "private" status until August 10, 1996, will not be afforded either the 10-year license term or the renewal expectancy during the statutory transition period.

[716] *See* Pittencrieff Comments at 14-15; Dial Page Reply Comments at 7.

10. *Assignment of Licenses and Transfers of Control*

a. Background and Pleadings

388. In the *Further Notice* we generally proposed adopting a uniform standard for assignment and transfer of control of most CMRS licenses upon completion of construction and initiation of service, provided that the applicant demonstrates that the transfer[717] will serve the public interest, convenience, and necessity. We proposed further to allow the transfer of unconstructed facilities in cases where the transfer is involuntary, *pro forma,* or does not result in a *de facto* change in control of the license. We also proposed to allow the transfer of unconstructed CMRS facilities over which services are provided on shared frequencies, *i.e.,* Business Radio and Part 90 paging utilizing frequencies below 800 MHz. We sought comment on whether the transfer restrictions currently applicable to Part 22 cellular licensees should be applied uniformly to all wide-area CMRS licensees.[718]

389. Nearly all of the commenters addressing this issue agree that the transfer policies adopted in Part 22 should be extended to all CMRS services.[719] The commenters, on the whole, also agree with our general proposal that the transfer of a CMRS license should be restricted until construction of the system has been completed and operation has begun.[720] A few commenters, however, believe that the list of exceptions to the "constructed station" exception should be expanded to include the transfer of an ongoing communications business where some of its stations are not yet in operation.[721] Other commenters oppose any holding period for CMRS licenses, arguing that licenses for both constructed and unconstructed facilities ought to be transferred freely. These commenters submit that the unjust enrichment safeguards adopted in the *Competitive Bidding Second Report and Order*[722] have eliminated

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[717] For the sake of brevity, the term "transfer" is used herein as a synonym for the phrases: "assign and transfer of control" or "assignment and transfer of control," depending on the context.

[718] *Further Notice,* 9 FCC Rcd at 2893 (paras. 144-146).

[719] *See, e.g.,* AMTA Comments at 44; McCaw Comments at 34; PageNet Comments at 31; PCC Comments at 19-20; Pittencrieff Comments at 15; Simrom Comments at 24-25.

[720] *See, e.g.,* McCaw Comments at 34; PCC Comments at 19; Pittencrieff Comments at 15; RAM Tech Comments at 28; Simrom Comments at 24-25; Southern Comments at 13; Southern Reply Comments at 13.

[721] *See, e.g.,* AMTA Comments at 43; Geotek Comments at 20; PageNet Comments at 45-46. Geotek, however, suggests that the sale of licensed facilities that are totally unconstructed should be absolutely prohibited. Geotek Comments at 20.

[722] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2394-95 (paras. 258-265).

the need for alienation restrictions.[723] Adopting a narrower view, another group of commenters contends that the current alienation restrictions should apply only to licenses acquired by lottery or comparative hearing. The underlying rationale for their position is that the auction mechanism effectively minimizes speculation and places the license in the hands of a party whose intentions to provide service to the public are serious.[724]

390. Our proposal to allow the unrestricted transfer of CMRS stations that use shared frequency bands is supported by a number of commenters and opposed by none. The commenters agree with our assessment that trafficking is not a practical concern on shared frequencies.[725] The response to our request for comments concerning the viability of uniform applicability of Part 22 cellular transfer restrictions to all wide-area CMRS licensees, is split. Although all of the commenters agree with the overall concept of uniformity, they have different opinions of what the actual requirements should be. One group recommends adopting the policies currently governing the licensing of unserved cellular areas, *i.e.*, that the system must be operated for one year before it may be transferred.[726] The other group's position is that construction status should no longer be a concern, since the licenses for unserved cellular areas will be auctioned off in the future. They therefore oppose the imposition of any ''holding period'' before wide-area CMRS authorizations may be transferred.[727]

391. An additional concern that several commenters raise centers on the applicability of the ''finder's preference'' currently provided in Part 90. Finder's preferences are granted to interested parties who provide information to the Commission that an authorized channel is not being used. If the authorization is canceled, the finder's application is then deemed the first-filed for the channel.[728] Some commenters favor retention, others favor modification,

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[723] *See, e.g.*, APACG Comments at 13; BellSouth Comments at 13-14; PageNet Comments at 45-46; PageNet Reply Comments at 14-16; PCIA Comments at 36; US West Comments at 9-10.

[724] *See, e.g.*, NABER Comments at 47; Nextel Comments at 45; Southern Comments at 13.

[725] *See, e.g.*, Celpage Comments at 29; Metrocall Comments at 29; NABER Comments at 47; Network Comments at 29; RAM Tech Comments at 28.

[726] *See, e.g.*, PCC Comments at 19-20; Simrom Comments at 25.

[727] *See, e.g.*, AMTA Comments at 43; Nextel Comments at 45; Nextel Reply Comments at 37-38; Southern Comments at 13-14.

[728] *See* 47 CFR § 90.173(k).

and others prefer elimination of this rule.[729] Other comments focus on the question of the appropriate form or forms that would be employed by those seeking authority to transfer CMRS licenses. In this regard, there appears to be consensus that the FCC Form 490, which is currently used by Part 22 applicants, should be used for all CMRS transfers, at least for an interim period.[730]

b. Discussion

392. We have stated throughout this proceeding that regulatory symmetry requires the elimination of inconsistent regulatory requirements applicable to CMRS services whenever practical. In order for this objective to be met, it is essential that we adopt uniform standards and procedures governing the transfer of CMRS authorizations. Moreover, these standards and procedures must be equally applicable to Part 90 and Part 22 CMRS licensees alike. As we have noted, the record supports our tentative conclusions. We are, therefore, adopting the following transfer requirements, which mirror the current Part 22 provisions.

393. No request for authority to transfer any CMRS license not awarded by competitive bidding will be entertained until the facilities for which the license has been issued are constructed and placed in operation, or we determine that the licensee is not ''trafficking'' in licenses, unless the application is for a transfer that is either involuntary or *pro forma*. These are the codified requirements that have been traditionally applied to Part 22 licensees in order to deter speculation.[731] No holding period is required when the transfer is either involuntary or *pro forma*, because the risk of speculation in these instances is nonexistent. We also agree with those commenters who suggest that the list of enumerated exceptions to the ''constructed station'' requirement should be expanded to include the transfer of unbuilt stations, if they are part of a *bona fide* sale of an on-going business to which they are incidental. In fact, this exception is already embodied in agency case law, which holds that such instances present little risk of speculation, and thus there is no reason to disrupt legitimate mergers or acquisitions simply because the acquired company has an unbuilt facility.[732] This ''incidental'' exception will be incorporated into the transfer provisions of Part 90.

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[729] *See, e.g.*, PCIA Comments at 37-38 (supporting clarification); Pittencrieff Comments at 16-17 (supporting elimination or modification); SMR Systems Comments at 8-9 (supporting expansion to all CMRS).

[730] *See, e.g.*, McCaw Comments at 33; PageNet Comments at 30-31; *see also* PCIA Comments at 25-26 (supporting adoption of a single form for CMRS transfers and assignments).

[731] *See* 47 CFR § 22.139.

[732] *See, e.g.*, Airsignal International, Inc., Memorandum Opinion and Order, 81 FCC 2d 472 (1980).

394. The transfer of a CMRS license awarded by comparative hearing is subject to both the foregoing ''trafficking'' restrictions and ''constructed station'' exceptions as well as a requirement that the facilities for which the license is held must have been in operation for one year prior to transfer.

395. We do not accept the position taken by some commenters, that the recently adopted transfer disclosure rules, by themselves, are a sufficient deterrent against speculators and, accordingly, permit us to eliminate the need for the construction and holding requirements as they apply to licenses acquired by lottery. The disclosure requirements are not a substitute, but rather an additional safeguard to prevent unjust enrichment with respect to licenses issued by lottery.[733]

396. Conversely, there will be no ''constructed station'' or other holding requirements for a CMRS license acquired through competitive bidding. The licensee may transfer the license at any time, assuming it has obtained prior Commission authority to do so. Gaining Commission approval, however, will require that the licensee document that it will not be unjustly enriched by the transfer and that it is in compliance with applicable pre-transfer rules, such as build-out requirements.[734] We have concluded that the auction mechanism and strict build-out requirements, coupled with requirements designed to prevent unjust enrichment, effectively reduce the risk of frivolous and speculative applications to such an extent that the need for additional safeguards does not appear to be necessary. Lastly, none of the disclosure and construction requirements that we have discussed will apply to the transfer of CMRS licenses on frequency bands that are shared. The record supports our conclusion that the risk of trafficking in such licenses is too remote to justify additional regulatory oversight in determining whether the transfer of a license in one of these services meets our public interest requirement. In most cases an applicant on a shared frequency could obtain its own authorization.

397. We now turn to the remaining concerns relating to transfers raised by the commenters. We agree with the commenters that a single form should be used for all CMRS transfers. In light of the unification of all CMRS services under a single regulatory framework, there is no reasonable justification for requiring Part 90 CMRS licensees to utilize one transfer form and Part 22 CMRS licensees to use another. Furthermore, since the CMRS licensing rules and procedures are more closely allied to the current Part 22 rules then they are to those currently contained in Part 90, we conclude that FCC Form 490, rather than FCC Forms 574 and 703, is the more appropriate transfer form to be used by all CMRS licensees.

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[733] *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, First Report and Order, FCC 94-32 (released. Feb. 4, 1994).

[734] *Id.*

398. We will not address the comments concerning finder's preference. Because the *Further Notice* did not solicit comment on the applicability of this rule, there is not an adequate record before us at this time to make a reasoned determination on this issue. As we indicated in the *Part 22 Rewrite Order*, the function of finder's preference mechanisms will be addressed in a future rule making proceeding.[735]

11. *Combined PMRS and CMRS Operation*

a. Background and Pleadings

399. In the *Further Notice* we proposed that applicants in Part 90 services, in which both CMRS and PMRS operations are permissible under the Commission's Rules, would be allowed to seek authority to provide both CMRS and PMRS services under a single authorization.[736] The *Further Notice* proposed that applications be treated as CMRS applications, and that the applicant be required to identify the portion of the assigned spectrum that would be dedicated to PMRS, and to describe the proposed PMRS offering in sufficient detail to demonstrate that the offering is not covered by the CMRS definition.[737]

400. CTIA contends that denying cellular licensees the right of combined operation will affect their ability to compete by unnecessarily restricting their ability to design arrangements that fully respond to customer service requirements. Moreover, CTIA argues, common carrier CMRS providers remain subject to other obligations, such as resale, which are not imposed upon PMRS. Consequently, contends CTIA, the proposed rule will create a regulatory disparity between those CMRS providers that are permitted to offer private services and those that are prohibited from doing so. CTIA asserts that PCS and Part 90 service providers will have an incentive to exploit the disparity for competitive advantage and requests that the Commission explicitly authorize all CMRS providers to engage in combined operation.[738] E.F. Johnson asserts that the Commission should adopt procedures that allow the initiation of a PMRS portion of a combined operation under STA while it considers the CMRS elements in the context of a formal application.[739]

401. PCIA argues that the Commission grant of flexibility should not be limited to Part 90 services and contends that Part 22 licensees should not be limited to CMRS

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[735] *See Part 22 Rewrite Order*, at para. 21.

[736] *Further Notice*, 9 FCC Rcd at 2893-94 (para. 148).

[737] *Id.*

[738] *See* CTIA Comments at 7. *See also* Bell Atlantic Comments at 5-8; Bell Atlantic Reply Comments at 4; McCaw Comments at 18-19.

[739] E.F. Johnson Comments at 26.

operations.[740] RMD asserts that mobile service providers should be able to provide CMRS and PMRS services under a single license, recognizing that if some of the services provided are CMRS, then CMRS licensing procedures should apply.[741] RMD contends that ultimately the Commission should consider applying CMRS procedures to all SMR applications even if no CMRS service is offered because of the potential administrative problems that could occur by subjecting applications for the same frequencies to different licensing mechanisms. RMD argues that utilizing common licensing procedures would have the advantage of eliminating concerns about whether a particular applicant may classify itself as commercial or private to take advantage of one set of licensing procedures over another. RMD asserts that the approach of asking applicants to identify different portions of the assigned spectrum that would be used for CMRS and PMRS services is not practical or, in some cases, even possible.[742]

b. Discussion

402. The comments on our proposal to permit CMRS and PMRS services to operate under a single authorization demonstrate that there are a myriad of complicated technical and policy issues that must be explored in greater depth before we will be able to begin issuing licenses for such combined operations. In particular, we need to determine how to apply inconsistent CMRS and PMRS regulations to the combined operations. For example, we must determine the license term for combined PMRS and CMRS operations. In addition, we need to evaluate whether we should allow pre-grant operation for mixed use operations, or whether the PMRS operations can be segregated from CMRS, with the pre-grant operation restriction applying only to CMRS. Accordingly, we conclude that it would be prudent to defer resolution of these and other issues and to seek further comments concerning the licensing of combined PMRS and CMRS operations. We do not believe that deferral of these questions will create delays in service availability since most reclassified PMRS are grandfathered and therefore continue to be regulated as private until August 10, 1996, at which time reclassification of these services as CMRS becomes effective. We also defer consideration of the question of whether Part 22 licensees should be permitted to provide CMRS and PMRS offerings under a single authorization. This issue has been raised in petitions for reconsideration of the *CMRS Second Report and Order*. We intend to address the question of combined CMRS and PMRS operations by Part 22 licensees in that proceeding.

12. *Conversion to CMRS Status by Existing Part 90 Licensees*

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[740] PCIA Comments at 36-37. *But cf.* AMTA Reply Comments at 7 (CMRS systems should not be permitted to offer both PMRS and CMRS services until the three-year transition period for reclassified systems has expired).

[741] RMD Comments at 13.

[742] *Id.*

a. Background and Pleadings

403. In the *Further Notice* we indicated that a mechanism is needed for specifying the regulatory status of each existing Part 90 licensee in its authorization and in the Commission's licensing data bases. We proposed to identify all existing licensees in the SMR, Business Radio, and 220 MHz services as CMRS or PMRS providers based upon whether the licensee's station classification authorizes the provision of for profit, interconnected service to the public.[743]

404. In the case of Part 90 paging licensees, we concluded previously that all such licensees will be presumed to be providing interconnected services to the public for purposes of determining their regulatory status.[744] Consequently, whether the licensee operates for profit would be the sole determining factor for this service. We also proposed to permit existing Part 90 licensees to request changes in their station class designations, to reflect actual operations, during the 90-day period following the effective date of the new rules.[745]

405. Response to our proposals relating to the issue of conversion to CMRS status by existing Part 90 licensees is limited. The few commenters addressing to our proposal to use station classification as the mechanism for determining whether an applicant or licensee is a CMRS or PMRS provider, do not oppose the idea.[746] Two of these commenters, NABER and E.F. Johnson, however, express some misgivings regarding the advisability of using station classification to determine regulatory status. They suggest that closer review in some instances will be necessary.[747] Another commenter, New Par, contends that if a licensee is unsure of its regulatory status, the licensee should request a declaratory ruling or other resolution from the Commission.[748]

406. The dominant concern of the commenters, however, appears to be the proposed time frames for reclassification. This concern centers around uncertainty regarding the specific Part 90 licensees that will be grandfathered and, thus, will not be subject to the bulk

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[743] *Further Notice*, 9 FCC Rcd at 2894 (para. 150).

[744] *See CMRS Second Report and Order*, 9 FCC Rcd at 1434-36.

[745] *Further Notice*, 9 FCC Rcd at 2894 (para. 151).

[746] *See, e.g.*, AMTA Comments at 44; E.F. Johnson Comments at 26-27; NABER Comments at 48; RMD Comments at 13; Simrom Comments at 25-28.

[747] *See* NABER Comments at 48; E.F. Johnson Comments at 27.

[748] New Par Comments at 5.

of the CMRS requirements until August 10, 1996,[749] and the applicability of the requirement that reclassified licensees correct their current authorizations to correspond to their actual operation. For example, E.F. Johnson submits that immediate reclassification should be required only for those licensees who received authorizations after the August 10, 1993, grandfather period. All other licensees, it claims, should be given one year, rather than the proposed 90 days, to amend their authorizations. E.F. Johnson reasons that because these licensees have three years to comply with the new CMRS rules, there is no need to require them to declare their status at this time.[750]

407. A similar argument is put forth by a second commenter, RMD, which contends that licensees should be required to reveal only their existing or then-planned status, and that future changes in status should be reflected in notification filings as changes in a particular licensee's manner of offering service occur over time. Like E.F. Johnson, RMD contends that it would be contrary to the public interest to require a licensee to freeze its CMRS or PMRS status, without any possibility for future change.[751] Two other commenters, AMTA and Simrom, surmise that the transition period, as it relates to local 220 MHz service, should be governed by the date that a licensee was selected as a lottery winner, rather than the date its license was issued. These commenters point out that although all of the licensees in this service are currently constructing their systems, some initial licenses were issued before August 10, 1993, while others were issued after that date. Consequently, AMTA and Simrom contend that allowing those licensees that received their authorizations before the August 10, 1993, cut-off date to be treated as PMRS providers until 1996, would arbitrarily divide local 220 MHz into two unequal regulatory structures, which will hinder development of the service.[752]

b. Discussion

408. We conclude that station classification is an acceptable mechanism for determining whether a Part 90 licensee should be reclassified as a PMRS or a CMRS provider. In arriving at this conclusion, we fully and carefully weighed the commenters' concerns that there may be instances in which station classification may not accurately portray a licensee's true status. Although we recognize the possibility of misclassification, we conclude that the risk of such errors is low. The licensee is responsible for determining the classification of its status and clearly is capable of determining if its service is (1) provided

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[749] The statutory foreign ownership restrictions are immediately applicable to all licensees. *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, First Report and Order, 9 FCC Rcd 1056 (1994).

[750] E.F. Johnson Comments at 26-27.

[751] RMD Comments at 13-14.

[752] AMTA Comments at 22; Simrom Comments at 25-28; *see also* SEA Reply Comments at 6-7.

for profit, (2) interconnected to the public switched network, and (3) available to the public. Moreover, as has been pointed out by one commenter, if the licensee for some reason is uncertain about whether its service is PMRS or CMRS, it can request clarification from the Commission.

409. We decline to adopt the suggestion that "grandfather rights" should extend not only to Part 90 licensees that were issued licenses before August 10, 1993, but also to those licensees that were lottery winners, and thus designated tentative selectees before the deadline. This issue was raised in petitions seeking reconsideration of the *CMRS Second Report and Order* and, thus, is now before the Commission.[753] Pending our action on reconsideration, we conclude that licensee status before the August 10, 1993, deadline is the sole factor in determining whether the licensee will be treated as being in the PMRS until August 10, 1996.

410. We also conclude that grandfathered licensees shall be allowed up to one year, from the date that the rule changes adopted in this Order become effective, to amend their station class designations to reflect their actual operations. We agree with the comments that there is no urgency requiring immediate reclassification of the grandfathered licensees since they will not be reclassified as CMRS carriers until 1996. We believe that reducing the number of licensees requiring immediate reclassification will also benefit us and the licensees by reducing administrative burdens.

411. Finally, we believe that the transition to CMRS should be effected as swiftly as practicable. Therefore, reclassified Part 90 licensees that are not grandfathered must amend their station class designation before the changes we are adopting take effect on January 2, 1995. Although some may argue that more time is needed, we would disagree. The licensees will have approximately 120 days for reclassification, which seems to be ample time to assure a smooth transition. The reclassification, as we stated in the *Further Notice*, is to reflect "actual" operations. By this we mean a licensee's existing or presently planned service offerings.[754] Consequently, concerns that immediate reclassification will prevent a licensee from altering its regulatory status at a future date if its operations change are unfounded.

IV. PROCEDURAL MATTERS; ORDERING CLAUSES

412. The Final Regulatory Flexibility Analysis, as required by Section 604 of the Regulatory Flexibility Act,[755] and as set forth in Appendix C, IS ADOPTED.

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[753] *See* GN Docket No. 93-252, Petition for Reconsideration of the American Mobile Telecommunications Association, Inc. at 9-11, filed May 19, 1994.

[754] *Further Notice*, 9 FCC Rcd at 2894 (para. 151).

[755] 5 U.S.C. § 604.

413. IT IS ORDERED that FCC Form 600, set forth in Appendix A, and the rule changes specified in Appendix B, ARE ADOPTED.

414. IT IS FURTHER ORDERED that the forms set forth in Appendix A and the rule changes set forth in Appendix B WILL BECOME EFFECTIVE on January 2, 1995. This action is taken pursuant to Sections 4(i), 4(j), 7(a), 302, 303(c), 303(f), 303(g), 303(r), 332(c), and 332(d) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 157(a), 302, 303(c), 303(f), 303(g), 303(r), 332(c), 332(d).

415. IT IS FURTHER ORDERED that the acceptance of 800 MHz applications on the 280 SMR category channels IS SUSPENDED, effective August 9, 1994, except that applications for transfer or assignment of existing SMR facilities will continue to be accepted.

416. IT IS FURTHER ORDERED that authority IS DELEGATED to the Chief, Common Carrier Bureau, as specified herein, to develop a new form or modify existing forms for licensees or applicants to certify and/or provide information showing that they are in compliance with the spectrum aggregation limit adopted in this Order.

417. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Report and Order to the Chief Counsel for Advocacy of the Small Business Administration.

418. IT IS FURTHER ORDERED that the motion to accept late-filed comments filed by E.F. Johnson Company IS GRANTED.

419. IT IS FURTHER ORDERED that the Request for Declaratory Ruling and Request for Rule Waiver filed by SunCom Mobile & Data IS DENIED.

420. IT IS FURTHER ORDERED that the Petition for Rule Making filed by the American Mobile Telecommunications Association, RM-8387, IS DISMISSED as moot.

421. IT IS FURTHER ORDERED that the Emergency Petition to Dismiss Comments and Reply Comments of the American Mobile Telecommunications Association, filed by Range Corporation d/b/a Range Telecommunications, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

FCC 600

FEDERAL COMMUNICATIONS COMMISSION

Information and Instructions

Application for Mobile Radio Service Authorization
or Rural Radiotelephone Service Authorization

Introduction
Form FCC 600 is a multi-part form comprising a main form and several optional schedules. Each application or amendment must contain one and only one main form (pages 1 and 2), but may contain as few or as many of the optional schedules as necessary. Some of the schedules are also used as attachments to Form FCC 489.

Applicable Rules and Regulations
Before the application is prepared, applicant should review the relevant part of the FCC rules in Title 47 of the Code of Federal Regulations. Copies of Title 47 may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402. FCC rules generally require various exhibits to be filed with an application in addition to the information requested in the application form. Applicants should make every effort to file complete applications. Failure to do so can result in a dismissal or return of the application or a delay in processing the application.

Paper Copies
The number of paper copies of this application required to be filed varies depending on the radio service. Refer to the pertinent part of the FCC rules for specific instructions.

Microfiche Copies (Part 22 and Part 24)
Applications on Form FCC 600 for authority to operate facilities in the radio services governed by Part 22 or Part 24 of the FCC rules must be filed in microfiche form. See the pertinent part of the FCC rules to determine how this requirement applies. If microfiche is required, submit three microfiche (one original and two copies). Each microfiche must be a copy of the signed original. Each microfiche copy must be a 148mm X 105mm negative (clear transparent characters appearing on an opaque background) at 24X to 27X reduction for microfiche or microfiche jackets. One of the microfiche sets must be a silver halide camera master or a copy made on silver halide film such as Kodak Direct Duplicating Film. The microfiche must be placed in paper microfiche envelopes and submitted in a 5" x 7.5" envelope. Row "A" (the first row for page images) of the first microfiche must be left blank.

Magnetic Disks, Electronic Filing
Applications on Form FCC 600 for authority to operate facilities in certain radio services may be filed in magnetic disk form or through electronic data transmission. See the pertinent part of the FCC rules to determine whether this provision applies and the requisite filing details.

For applications in the services governed by Part 22 or Part 24 of the FCC rules, each filing must be in a separate computer file, even if on the same disk. Each item must consist of the item number followed by >>> followed by the data, followed by the character sequence <<< (followed by CRLF) to mark the end of the item (e.g. 7>>>DC<<<). For items from Schedules B or C, use bracketed, comma delimited integers to indicate as needed the schedule number, FCC location number, FCC antenna number and FCC transmitter number. For example, if the second Schedule C in a filing is to add a location number 15, the sequence C1{2,15}>>>A<<< must appear in the file. For another example, if the fourth Schedule B in a filing is to add a transmitter number 3 to operate on 152.24 MHz using antenna 2 at location 12, the sequences B43{4,12,2,3}>>>A<<< and B44{4,12,2,3}>>>152.24<<< must appear in the file. In general, attached exhibits use the item number to which they refer with an "A" suffix. All data and text must be in ASCII format.

Processing Fee
A processing fee may be required with this form. To determine the required fee amount, refer to Subpart G of Part 1 of the FCC's rules (47 CFR Part 1, Subpart G) or the current fee filing guide for the radio service involved. For assistance with fees applicable in the radio services governed by Part 22 and Part 24 of the FCC rules, call (202) 418-0220. For assistance with fees in other radio services, contact the Consumer Assistance Branch, Federal Communications Commission, Gettysburg, PA 17326, (800) 322-1117.

Incorporation by Reference (Part 22 and Part 24)
You may incorporate by reference documents, exhibits, or other lengthy showings already on file with the FCC only if: the information previously filed is more than one 8½" by 11" page in length, and all information therein is current and accurate in all significant respects; the reference states specifically where the previously filed information can be found (i.e., station call sign and application file number, title of proceeding, docket number and legal citations), including exhibit and page references. Use the relevant item number followed by "A". Items that call for numbers, or which can be answered "Y" or "N" by or other short answers must be answered directly without reference to a previous filing.

Current Information
Information filed with the FCC must be kept current. The applicant should notify the FCC regarding any material change in the facts as they appear in the application. See 47 CFR 1.65.

Waiver Requests
Requests for waivers must contain as an exhibit a statement of reasons sufficient to justify a waiver. A separate request with the required showing must be made for each rule waiver desired, identifying the specific rule or policy for which the waiver is requested. For waiver requests other than for rules in Part 22 and Part 24, there may be a fee requirement. Refer to the appropriate FCC fee filing guide.

Exhibits (Part 22 and Part 24)
Each document required to be filed as an exhibit should be current as of the date of filing. Each page of each exhibit must be identified with the number or letter of the exhibit, the number of the page of the exhibit and the total number of pages of the exhibit. If material is to be incorporated by reference, see the instruction on incorporation by reference. If interference studies are required by rule, attach these as an exhibit. If this application is a request for an extension of time to complete construction, then attach as an exhibit a statement explaining how failure to complete construction was beyond the applicant's control.

Paperwork Reduction and Privacy Act Notice
The solicitation of personal information requested in this form is authorized by the Communications Act of 1934, as amended. The FCC will use the information provided in this form to determine whether grant of this application is in the public interest. In reaching that determination, or for law enforcement purposes, it may become necessary to refer personal information contained in this form to another government agency. In addition, all information provided in this form will be available for public inspection. If information requested on the form is not provided, processing of the application may be delayed

or the application may be returned without action pursuant to FCC rules. Your response is required to obtain the requested authority.

Public reporting burden for this collection is estimated to be ## to ## hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Federal Communications Commission, Office of Managing Director, Washington, D.C. 20554, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (3060-0046), Washington, D.C. 20503.

The foregoing Notice is required by the Privacy Act of 1974, P.L. 93-597, December 31, 1974, 5 U.S.C. 552a(e)(3), and the Paperwork Reduction Act of 1980, P.L. 96-511, Section 3504(c)(3).

International Registration (other than Part 22 and Part 24)
NOTICE: As a signatory party to international treaty agreements, the FCC performs certain actions regarding the use of radio. The technical details of your station parameters may be reported to the International Telecommunication Union, Geneva, Switzerland and to countries which border on or are in close proximity to the United States. This information along with data reported by other nations will be used to protect reported stations and aid in resolution of interference disputes between licensees in different countries.

Certain stations, because of their geographic location, would be best protected by provision of additional information. Specifically, this includes any proposed station which is located in the region north of Line "A" as defined in Section 1.955 of FCC rules, or in the State of Alaska east of Line "C". If the desired station is to operate in the 806-821/851-866, 821-824/866-869, 896-901/935-940 MHz bands, please consult the applicable rules for available frequencies and use near the United States/Canada/Mexico border.

Note: For control stations meeting the 20 foot criteria that require greater than 5 watts output power/ERP for operations in regions north of Line "A" or in Alaska east of Line "C", complete Schedule E items E1-E8 and Schedule G items G1-G6 and G8 as LOC letter A-F.

For your convenience and ease of determination, a list of all States and counties within those States above line "A", for which applicants may wish to submit additional information, has been included following schedule H instructions and designated Appendix 1. In addition, a new form labeled Form 600 Schedule H has been developed for supplying this information. Because the operational characteristics for the majority of Land Mobile stations are quite similar, submission of all of the data requested by the ITU or other nations imposes a somewhat heavier burden on applicants than would seem necessary. NOTE: However, the form in which certain information is provided, can significantly benefit an applicant. In particular, mobile or temporary stations whose area of operation is defined in terms of a kilometer radius of specified geographical coordinates will provide for more accurate protection of these stations than defining their area of operation by some other means (See items E9-E11 on the Form 600 Schedule E) and will expedite the coordination process where it is necessary.

Unless advised to the contrary, the FCC will make certain assumptions which reflect the typical station in these services. Carefully review the list below with respect to your particular situation. If you believe that these assumptions would leave your station insufficiently protected, provide the correct data on Form 600 Schedule H and attach it with your application. If you do not provide the actual data and an interference problem arises involving another country's station, your station will be protected only to the limit of the FCC's assumptions.

The following station parameters will be assumed unless otherwise stated:

1. **Antenna Polarization.** All stations will be reported as having antennas with vertical polarization.

2. **Antenna Gain.** The antenna gain for all stations will be assumed to be 6 dB.

3. **Antenna Azimuth of Main Lobe.** We will report each base or mobile relay station as having an omnidirectional (360 degrees) azimuth. We will assume that each control station associated with a mobile relay station has a directional antenna with its azimuth of maximum radiation directed toward the mobile relay station.

4. **Beamwidth.** Where an omnidirectional antenna is assumed, beamwidth has no relevance, and therefore, no assumed value will be used. For control stations we will assume 20 degrees.

5. **Class of Operation for HF Fixed Stations.** All HF Fixed applicants must file Form 600 Schedule H. Therefore no assumption will be made.

6. **Receiver Information.** All stations specified on the same application form are assumed to be communicating with each other as a system. Receivers will be assumed to operate at the same location as the transmitter. In other words, we will assume that the receiver site for a mobile station transmission is the location of the associated base station. The receiver site for a base station transmission will be assumed to be the area of operation of the associated mobile stations. For a control station transmission, the location of the associated mobile relay station is the location of the receiver.

7. Control stations meeting the 20 foot criteria that are operating in the region north of Line "A" or in Alaska east of Line "C" will not be coordinated with Canada unless Schedule E items E1 - E8 and Schedule G items G1 - G6 and G8 are completed as LOC letter A - F. The ERP will be limited to 5 watts if the fixed location is not provided for controls meeting the 20 foot criteria operating in these areas.

Frequency Coordination
All applications for station authorizations which require frequency coordination in accordance with applicable FCC rules and any correspondence relating thereto, must initially be submitted to the certified frequency coordinator for the radio service or frequency group involved. For frequency coordination fee information, contact the appropriate frequency coordinator for your radio service. After the completion of frequency coordination, these applications shall be forwarded by the coordinator to the correct address. All other applications shall be filed by the applicant at the correct address listed on the most current Public Notice. Applications should be filed at least sixty (60) days prior to the date upon which the radio facilities are required to be in operation.

List of Certified Coordinators (other than Part 22 and Part 24)
See the most current Public Notice for correct addresses or contact Consumer Assistance Branch, Federal Communications Commission, Gettysburg, PA 17326 (717) 337-1212.

Quiet Zone
The quiet zone is a restricted area of operation within Virginia, West Virginia, and Garrett County, Maryland in the vicinity of the National Radio Astronomy Observatory, Green Bank, Pocahontas County, West Virginia. Permanent Stations in this area should be checked for compliance with applicable Commission rules. If the permanent station, including control stations meeting the 20 foot criteria, is bounded by 39 15'N on the north, 78 30'W on the east, 37 30'N on the south, and 80 30'W on the west, the application must be accompanied by a copy of the clearance obtained from the National Radio Astronomy Observatory.

The request for clearance must be sent to: National Radio Astronomy Observatory, P.O. Box 2, Green Bank, West Virginia 24944.

Specific Instructions for the Main Form

APPLICANT

Items 1-8 These items identify the applicant. If an authorization is granted, the information provided will become the licensee's name, address and telephone numbers of record, and the authorization will be sent to this address. Applicants must provide a current and valid mailing address in the United States, and this address must be that of the applicant, not the address of the radio equipment supplier, service shop or of any other third party. Failure to respond to FCC correspondence sent to the address of record may result in dismissal of an application, liability for forfeiture or revocation of an authorization.

Items 9-16 These items identify the contact representative (usually the headquarters office of a large applicant, the law firm or other representative of the applicant, or the person or company that prepared or submitted the application on behalf of the applicant). In the event there is a question concerning the application, the FCC will attempt to communicate with the contact representative first.

CLASSIFICATION OF FILING

Item 17 Indicates whether the filing is intended as an application or an amendment to a previously filed application. If "N" is indicated, the FCC will assign a new file number to the filing. If "A" is indicated, the FCC will attempt to associate the filing with a pending application described by Item 21.

Item 18 Indicates whether the applicant believes that the FCC should classify the filing, for purposes of compliance with Section 309 of the Communications Act of 1934, as amended, as an application for a *minor* change to an existing station, if the filing is an application, or as a *minor* amendment, if the filing is an amendment. For private radio services to which Section 309 does not apply, this item should be marked "D". For commercial mobile services, which are subject to Section 309, this item must be marked either "Y" or "N". If this item is marked "Y", the FCC will not list the filing in a Public Notice unless during processing the FCC subsequently determines that the filing should not be classified as minor. If this item is marked "N" and the filing appears to be acceptable for filing, the FCC will list the filing in a Public Notice as acceptable for filing prior to actually classifying it during processing.

Item 19 This item indicates whether the filing proposes an initial facility, modification of an existing facility or renewal of an existing station, for the purposes of classification in regard to eligibility for inclusion in competitive bidding procedures. In the event that the filing is or becomes mutually exclusive with one or more other filings, the indication given here assists the FCC in determining what method will be used to select which filing(s) to grant. This item does not have to be completed for minor applications or amendments.

Item 20 If the filing is related to an existing station, this item must be completed. The information requested in this item (call sign) identifies the existing station to which the filing is relevant.

Item 21 If the filing is an amendment to a previously-filed application, this item must be completed. The information requested in this item identifies the previously-filed application.

NATURE OF SERVICE

Item 22 This item indicates whether the applicant is applying for authorization to provide or use commercial mobile radio service, private mobile service, both commercial and private mobile service, or fixed service (such as Rural Radiotelephone Service, including BETRS). If the answer is "both", attach as an exhibit a description of the proposed service that explains why the applicant believes that a portion of the service to be provided should be classified as a private mobile service. Use 22A as the item number for the exhibit.

Item 23-25 These items request information that the FCC could use to determine whether a proposed service is a commercial mobile radio service or a private radio service under Section 332 of the Communications Act of 1934, as amended. Item 23 must be answered "P" if the proposed service is to be made available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public, "E" if the service is to be made available to eligible users other than the applicant, but not constituting a substantial portion of the public, or "I" if the service will be available only to the applicant and its employees. Item 24 must be marked "P" if the service is to be provided for profit, *i.e.* with the intent of receiving compensation or monetary gain. Item 25 must be marked "Y" if the applicant proposes to provide interconnected service as defined in § 20.3 of the FCC rules.

Item 26 This item requests a two-letter code designating the FCC radio service, or radio service sub-category, in which the applicant requests authorization and to which any requested channels are allocated. The codes are as follows:

Commercial	
Personal Communications Service	
Broadband	CW
Narrowband	CN
Cellular Radiotelephone Service	CL
Paging and Radiotelephone Service	CD
Air-ground Radiotelephone Service	CG
Offshore Radiotelephone Service	CO
Rural Radiotelephone Service	CR
Specialized Mobile Radio	
806-821/851-866 MHz, conventional	GX
806-821/851-866 MHz, trunked	YX
896-901/935-940 MHz, conventional	GR
896-901/935-940 MHz, trunked	YS
220 MHz Systems	
Nationwide Non-Commercial 10 Channel	NL
Nationwide Non-Commercial 5 Channel	NS
Nationwide Commercial 5 Channel	NC
Non-Nationwide 5 Channel Trunked	QT
Non-Nationwide Data	QD
Non-Nationwide Public Safety / Mutual Aid	QM
Non-Nationwide Other	QO
Industrial	
Business Radio Service	
806-821/851-866 MHz, conventional	GB
806-821/851-866 MHz, trunked	YB
896-901/935-940 MHz, conventional	GU
896-901/935-940 MHz, trunked	YU
929-930 MHz paging systems	GS
other	IB
Industrial services, except Business Radio Service	
806-821/851-866 MHz, conventional	GO
806-821/851-866 MHz, trunked	YO
896-901/935-940 MHz, conventional	GI
896-901/935-940 MHz, trunked	YI
other:	
Forest Products Radio Service	IF
Petroleum Radio Service	IP
Special Industrial Radio Service	IS
Telephone Maintenance Radio Service	IT
Film and Video Production Radio Service	IV
Power Radio Service	IW
Manufacturers Radio Service	IX
Relay Press Radio Service	IY
Land Transportation	
Land Transportation services	
806-821/851-866 MHz, conventional	GO
806-821/851-866 MHz, trunked	YO
896-901/935-940 MHz, conventional	GI
896-901/935-940 MHz, trunked	YI

other:

Automobile Emergency Radio Service	LA
Railroad Radio Service	LR
Taxicab Radio Service	LX
Interurban Passenger Radio Service	LI
Interurban Property Radio Service	LJ
Urban Passenger Radio Service	LU
Urban Property Radio Service	LV

Public Safety
National Plan

821-824/866-869 MHz, conventional	GF
821-824/866-869 MHz, trunked	YF

Public Safety services

806-821/851-866 MHz, conventional	GP
806-821/851-866 MHz, trunked	YP
896-901/935-940 MHz, conventional	GA
896-901/935-940 MHz, trunked	YA

other:

Fire Radio Service	PF
Highway Maintenance Radio Service	PH
Local Government Radio Service	PL
Emergency Medical Radio Service	PM
Police Radio Service	PP
Forestry Conservation Radio Service	PO

Special Emergency

Special Emergency Radio Service	PS

Other

Low Power Auxiliary Broadcast	LP
Remote Pickup Auxiliary Broadcast	RP
Radiolocation Radio Service	RS

Item 27 This item requests a two-letter code indicating the type of operation proposed. The codes are as follows:

One-way paging	OP
Response paging	RP
Two-way mobile telephone	TT
Two-way mobile data	TD
Two-way mobile telephone, data & images	TB
Two-way mobile communications	TC
Dispatch	OP
Rural radiotelephone, conventional	RR
Rural radiotelephone, BETRS	RB
Air-ground radiotelephone	AR
Point-to-point	PP
Point-to-multipoint	PM
Other	NS

ENVIRONMENTAL POLICY

Item 28 This item is required for compliance with the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321-4335. See also Part 1, Subpart I of the FCC rules (47 CFR 1.1301-1.1319). Answer "Y" if a FCC grant of the proposed facility may have a significant environmental effect as defined in § 1.1307 of the FCC rules and attach an exhibit with the required environmental assessment. Use 28A as the item number for this attachment. Examples of facilities that may have a significant effect on the environment include:

- a new antenna structure located in a residential area for which the FAA requires high intensity aviation obstruction lighting
- a facility located in an officially designated wilderness area, wildlife preserve or floodplain
- a facility that affects a site significant in American history
- a facility, the construction of which involves extensive changes in surface features

ALIEN OWNERSHIP

Items 29-33 These items request indications and information that enable the FCC to determine whether or not an applicant is eligible under Section 310 of the Communications Act of 1934, as amended, to hold a station license. The FCC can not grant any authorization normally obtained by filing this form to a foreign government or the representative of a foreign government. Therefore, if the true and correct answer to Item 29 is "Y", the applicant is not eligible for a license and the FCC will dismiss the application, if filed, without further consideration. Likewise, the FCC can not grant an authorization to provide commercial mobile radio service to any applicant for which the true and correct answer to Item 30, 31 or 32 is "Y". If the answer to Item 33 is "Y" and the application is for authorization to provide commercial mobile radio service, attach an exhibit explaining the nature and extent of any foreign ownership or control. Use 33A as the item number for this exhibit.

BASIC QUALIFICATIONS

Items 34-38 These items request indications and information that enable the FCC to determine whether an applicant is disqualified from holding an FCC authorization because of misconduct. Items 34-36 must be answered "N" if there is no misconduct. Item 37 must be answered "N" if the applicant is not a party in any pending matter relevant to misconduct. Item 38 must be answered "Y" if the applicant is not subject to denial of federal benefits pursuant to the Anti-Drug Abuse Act of 1988 (21 U.S.C. § 862). If the answer to items 34, 35, 36 or 37 is "Y" or if the answer to item 38 is "N", attach as an exhibit a statement explaining the circumstances and why the applicant believes that an FCC grant of the application would be in the public interest notwithstanding the actual or alleged misconduct. Use 34A, 35A, 36A, 37A or 38A as the item number(s) for such exhibits, respectively.

CERTIFICATION

Items 39-43 To be acceptable for filing, applications and amendments must be signed in accordance with Part 1 of the FCC rules. The signer must be a person authorized to sign the application. Paper originals of applications must bear an original signature. Neither rubber-stamped nor photocopied signatures are acceptable.

The Schedules

The purposes of the schedules are as follows:

SCHEDULE A

One Schedule A is required for each application or amendment in the radio services governed by Part 22 or Part 24 of FCC rules. These services are the Personal Communications Service, the Cellular Radiotelephone Service, the Paging and Radiotelephone Service, the Rural Radiotelephone Service, the Offshore Radiotelephone Service and the Air-ground Radiotelephone Service. Schedule A indicates the purpose of the filing. It is the only schedule needed for initial systems where no site specific data is being submitted, and for requests for extension of time to construct facilities. Schedule A must not be filed with Schedules D or E.

SCHEDULE B

Schedule B is used when site-specific data is required for applications, amendments or notifications involving individual channel assignments, in the radio services for which Schedule A is required. At least one Schedule B must be filed for each location for which data is required. Schedule B provides location data, information concerning proximity to market boundaries, technical information concerning the antennas and transmitters at the particular location, radial power and antenna height data, and information about points of communication for transmitters at the particular location. Each Schedule B can hold data for multiple antennas at one location by using additional copies of page 2. For each antenna, Schedule B can hold data for up to four transmitters and/or channels. Additional Schedule Bs may be filed for the same location or antenna if necessary.

SCHEDULE C

Schedule C is used when site-specific data is required for applications, amendments or notifications in the radio services for which Schedule A

is required and for which spectrum is assigned in channel blocks. One Schedule C must be filed for each location for which data is required. Schedule C provides location data, technical parameters of the facility at the particular location, radial power and antenna height data.

SCHEDULE D
Schedule D is required for applications and amendments in all radio services for which Form FCC 600 may be used, except those for which Schedule A is required. It provides additional administrative data for stations in these services.

SCHEDULE E
Schedule E is required for applications and amendments in all radio services for which Form FCC 600 may be used, except those for which Schedule A is required. It provides station location data for stations in these services.

SCHEDULE F
Schedule F is required when site-specific data is submitted on Schedule B, C or E, and the antenna structure proposed exceeds or would exceed the criteria in Part 17 of the FCC rules. Schedule F may also be filed when it is necessary to obtain new aviation obstruction marking and lighting requirements for the antenna structures at fixed sites. In some services (e.g. PCS), marking and lighting requirements must be obtained independently of the system authorization by filing Form FCC 854. See the pertinent part(s) of the FCC rules.

SCHEDULE G
Schedule G is required for applications and amendments in all radio services for which Form FCC 600 may be used, except those for which Schedule A is required. It provides technical data for stations in these services. The reverse side of Schedule G provides for additional frequencies. Additional Schedule Gs may be filed if necessary.

SCHEDULE H
Schedule H is required for applications and amendments in the Remote Pickup Broadcast Auxiliary Radio Service and for land mobile stations operating on frequencies lower than 27.5 MHz. Land mobile stations located near international borders that seek protection from interference should complete Schedule H.

Schedules Required (other than Part 22 and Part 24)
If the application to be submitted includes fixed or permanent location stations (A - F), complete the Main Form, Schedule D, Schedule E, Schedule F and Schedule G. Schedule H must also be completed for fixed location stations proposed in the Remote Pickup Broadcast Auxiliary Radio Service.

If the application to be submitted includes **only** control stations meeting the 20 foot criteria, mobile, temporary or itinerant locations (G - Z), complete Form 600 Main Form, Schedule D, Schedule E and Schedule G.

Note: The Main Form and applicable schedules should be submitted as one package, stapled in the upper left corner. The Main Form should be first with the following schedules in alphabetical order.

HF Station Filings
All stations proposing to operate on frequencies below 27.5 MHz must complete Schedule H. Failure to do so will result in the return of the application without further action.

Specific Instructions for Schedule A
Administrative Information

PURPOSE OF FILING
Item A1 This item states the purpose(s) for the filing. Enter one or more letters corresponding to the listed purposes. If none of the listed purposes correctly describe the reason the for filing, if the filing requests a waiver of one or more FCC rules or an extension of time to construct facilities, attach as an exhibit a narrative description of the purpose, circumstances and/or waiver request including required justification. Use A1A as the item number for this exhibit.

MARKET / CHANNEL BLOCK
Item A2 This item must be answered only if the filing is for an authorization in one of the radio services that is licensed on a geographic licensing area or "market" basis (e.g. Cellular Radio Service). It identifies the market to which the filing pertains. The market designators are listed in FCC Public Notices or in the FCC Record. This item should not be answered for filings in radio services licensed on a station-by-station basis.

Item A3 This item must be answered only if the filing is for an authorization in one of the radio services for which spectrum is assigned in channel blocks. For filings in the Cellular Radio Service, the answer to this item is either "A" or "B" For filings in the Air-ground Radiotelephone Service (commercial aviation), the answer to this item is "C-" followed by a number between 1 and 29 (e.g. C-17). This item should not be answered for filings in radio services in which channels are individually assigned.

Item A4 This item must be answered only if the filing is for an authorization in one of the radio services that is licensed on a geographic licensing area or "market" basis and the market has been subdivided.

Item A5 This item must be answered only if the filing is for an authorization in one of the radio services that is licensed on a geographic licensing area or "market" basis (e.g. Cellular Radio Service). In addition to item A2, It identifies the market to which the filing pertains. The market names are listed in FCC Public Notices or in the FCC Record. This item should not be answered for filings in radio services licensed on a station by station basis.

CONTROL POINTS
Items A6-A9 These items provide the location(s) of the station or system control points, and the telephone number(s) where a person responsible for operation of the station or system could be reached, if necessary. These items must be answered only for new systems or stations and when a control point is to be added, deleted or modified. These items do not have to be answered for broadcast subcarrier paging (i.e. if the answer to item A1 is "O"). If a control point modification is the only purpose of the filing, answer item A1 "S" and file Schedule A as an attachment to Form FCC 489, rather than Form FCC 600. To move an existing control point or change a telephone number, delete the old information and add the new.

FACILITIES NOT CONSTRUCTED
Items A10-A12 These items must be completed only in connection with (1) filings that request an extension of time to construct specific facilities in services where locations are individually subject to a construction period requirement, and the rest of the station or system has been completed; (2) notifications, using Schedule A as an attachment, reporting that a system has been partially constructed. In some cases where more than one antenna or transmitter is authorized at a location, and some but not all of the facilities have been constructed, it may be necessary to further distinguish the unconstructed facilities by channel. If so, indicate the affected channels in an exhibit, using item number A10A.

Specific Instructions for Schedule B
Technical Data - Individual Channel Assignment

LOCATION
Item B1 This item indicates what action the filer wants the FCC to take in the database with regard to the location specified in items B2-B10. If the filing is for a new station or system or for a new location in an

existing system or station (i.e. the location does not already exist on any channel in the authorized system or station or in a pending application for the same system or station), the answer to this item is "A". If the location is an existing location in the authorized system or station or a location proposed in a pending application for the same system or station, and *the licensee has abandoned or intends to abandon the location completely*, the answer to this item is "D". (Also see the instruction for items B11-B14 below.) In all other cases, the answer to this item is "M". If the filer answers this item "A" and the FCC computer finds an exact match for the location within the system or station, the Schedule B will be processed as if this item had been answered "M". If the filer answers this item "M" and the FCC computer cannot find an exact match for the specified location within the system or station, the Schedule B will be processed as if this item had been answered "A". If the filer answers this item "D" and the FCC computer cannot find an exact match for the specified location within the system or station, the Schedule B will not be processed.

Item B2 This item is the FCC assigned location number for an existing location, or for a new location, a letter (e.g. A, B, C etc). In either case, this item is used as the key to identify the location on Schedule F (if Schedule F is filed).

Items B3-B6 These items identify the location by its address or, if there is no address, by a brief description of the location such as a distance and direction from known landmarks (e.g. "5 km south of Anytown, US").

Items B7, B8, B9 and B10 These items are the geographic coordinates of the location. Items B7 and B8 are the North latitude and West longitude, respectively, with reference to the North American Datum of 1927. Items B7 and B8 are required. Items B9 and B10 are the North latitude and West longitude, respectively, with reference to the North American Datum of 1983. Items B9 and B10 are optional, but may assist processing of the Schedule B.

Items B11-B14 These items key to location data in the data base that is to be replaced by the data in items B3-B10. The filer should complete these items only if (1) correcting geographical coordinates or (2) relocating *all* facilities at the location indicated by these items to the location specified in items B3-B10. The filer must *not* complete these items if the intent is to relocate some, *but not all*, of the facilities at a particular location. (In such a case, the filer must submit two Schedule Bs with the filing - one to delete the facilities at the previous location and another to add those facilities at the new location.)

SUPPLEMENTARY LOCATION INFORMATION

Item B15 This item is optional and concerns proximity of the location to Canada. If the filer does not know whether the location is North of Line A or East of Line C, this item should be left blank. If the filer answers "A" or "C" (and this appears to be plausibly correct), the FCC will initiate applicable coordination procedures with the Government of Canada. In the event the filer needs to submit additional information regarding coordination of a channel assignment with the Government of Canada, this should be attached as an exhibit, using item number B15A.

Item B16 This item is optional and concerns proximity of the location to Mexico. If the filer does not know whether the location within 200 kilometers (124 miles) of the U.S.-Mexico border, this item should be left blank. If the filer answers "Y" (and this appears to be plausibly correct), the FCC will initiate applicable coordination procedures with the Government of Mexico. In the event the filer needs to submit additional information regarding coordination of a channel assignment with the Government of Mexico, this should be attached as an exhibit, using item number B16A.

Items B17-B19 These items must be completed only for filings in the narrowband Personal Communications Service (other than nationwide and response channel related filings).

ANTENNA

Item B20 This item indicates what action the filer wants the FCC to take in the database with regard to the antenna specified in items B22-B28. If the filing is for a new antenna (i.e. the antenna does not already exist at this location for any channel in the authorized system or station or in a pending application for the same system or station), the answer to this item is "A". If the antenna is an existing antenna in the authorized system or station or an antenna proposed in a pending application for the same system or station, and *the licensee has abandoned or intends to abandon the antenna completely*, the answer to this item is "D". In all other cases, the answer to this item is "M". If the filer answers this item "A" and the FCC computer finds an exact match for the antenna within the system or station, this portion of the Schedule B will be processed as if this item had been answered "M". If the filer answers this item "M" and the FCC computer cannot find an exact match for the specified antenna within the system or station, this portion of the Schedule B will be processed as if this item had been answered "A". If the filer answers this item "D" and the FCC computer cannot find an exact match for the specified antenna within the system or station, this portion of the Schedule B will not be processed.

Item B21 This item indicates whether the antenna in question is already authorized or whether it is only proposed in a pending application. The filer must answer this item.

Item B22 This item indicates the FCC antenna number of the antenna. If a number has been printed on an authorization the applicant knows it, he or she should complete this item.

Items B23-B28 This item describes the antenna by its type, manufacturer and model number, and must be completed for all filings except for those in the Air-ground Radiotelephone Service. Type means a generic description (e.g. collinear vertical, Yagi, panel array). Manufacturer is the name of the company that made the antenna, and model number is the designation that the manufacturer assigns to the antenna. If a polar plot of the antenna horizontal or vertical radiation pattern is required by the pertinent FCC rules, attach as an exhibit such plot (or in the case of electronic or magnetic filing, substitute a table of the polar data for 360° in 5° increments in the format: bearing, $gain_{dBd}$), using item number B25A.

Items B26 & B28 These items report the actual and effective height at which the antenna is mounted. These items must be completed for all filings except for those in the Air-ground Radiotelephone Service.

Item B27 This item provides the beamwidth of the main major lobe of a directional antenna used with a fixed station. This item need not be completed for any stations other than fixed stations.

TRANSMITTERS FOR ANTENNA

Item B29 This item is the FCC transmitter number for the transmitter.

Item B30 This item indicates what action the filer wants the FCC to take in the database with regard to as many as four transmitters (or channels) associated with the (same) antenna. If the filing is for a new transmitter or channel (i.e. a transmitter or channel that does not already exist for this antenna at this location in the system or station or in a pending application for the same system or station), the answer to this item is "A". If the transmitter or channel already exists for this antenna at this location in the authorized system or station or for an antenna at this location proposed in a pending application for the same system or station, and *the licensee has abandoned or intends to abandon the transmitter or channel completely*, the answer to this item is "D". In all other cases, the answer to this item is "M". If the filer answers this item "A" and the FCC computer finds an exact match for

the transmitter or channel for this antenna at this location within the system or station, this portion of the Schedule B will be processed as if this item had been answered "M". If the filer answers this item "M" and the FCC computer cannot find an exact match for the specified transmitter or channel for this antenna at this location within the system or station, this portion of the Schedule B will be processed as if this item had been answered "A". If the filer answers this item "D" and the FCC computer cannot find an exact match for the specified transmitter or channel for this antenna at this location within the system or station, this portion of the Schedule B will not be processed.

Item B31 This item specifies the center frequencies of the channels on which the transmitters operate are are proposed to operate. The pertinent channel(s) must be specified for each transmitter.

Item B32 This item requests a four letter code that identifies the transmitter class. The four letter code consists of two letters that conform to the international station classification nomenclature used by the International Frequency Registration Board, followed by two letters that further classify the transmitter by usage. The codes are as follows:

Base	FBBS
Standby	FBST
Mobile subscriber	MLSB
Dispatch	FXDI
Auxiliary test	FXTS
Control	FXCT
Repeater	FXRP
Fixed relay	FXRX
Ground	FBGS
Air-ground signaling	FBSI
Inter-office	FXIO
Fixed subscriber	FXSB
Central office	FXCO

Item B33 This item should be completed only if the filing requests authority to use an emission type that is not already authorized in the FCC rules for use by all stations in the pertinent radio service.

Item B34 This item reports the maximum effective radiated power (ERP) in any direction on the specified channel. This item must be completed for all transmitter filings. The answer must be stated in Watts.

RADIAL DATA FOR ANTENNA

Item B35 This item reports the height of the antenna center of radiation above the average terrain elevation (AAT) along each of the eight cardinal radials. This item must be completed for all antenna filings except for those in the Air-ground Radiotelephone Service.

Items B36-B39 These items report the effective radiated power (ERP) for each transmitter or channel in each of the eight cardinal radial directions. These items must be completed for all transmitter filings except for those in the Air-ground Radiotelephone Service.

POINTS OF COMMUNICATION FOR ANTENNA

Items B40-B45 These items describe fixed points of communication for (1) stations in the Rural Radiotelephone Service serving individually licensed subscribers, and (2) point-to-multipoint transmitters operating on channels that are assigned only to stations that communicate with four or more points. These items should not be completed by filers for any other purpose.

Specific Instructions for Schedule C
Technical Data - Block Channel Assignment

LOCATION

Item C1 This item indicates what action the filer wants the FCC to take in the database with regard to the location specified in items C3-C10. If the filing is for a new station or system or for a new location in an existing system or station (i.e. the location does not already exist in the authorized system or station or in a pending application for the same system or station), the answer to this item is "A". If the location is an existing location in the authorized system or station or a location proposed in a pending application for the same system or station, and *the licensee has abandoned or intends to abandon the location completely*, the answer to this item is "D". (Also see the instruction for items C11-C14 below.) In all other cases, the answer to this item is "M". If the filer answers this item "A" and the FCC computer finds an exact match for the location within the system or station, the Schedule C will be processed as if this item had been answered "M". If the filer answers this item "M" and the FCC computer cannot find an exact match for the specified location within the system or station, the Schedule C will be processed as if this item had been answered "A". If the filer answers this item "D" and the FCC computer cannot find an exact match for the specified location within the system or station, the Schedule C will not be processed.

Item C2 This item is the FCC assigned location number for an existing location, or for a new location, a letter (e.g. A, B, C etc). In either case, this item is used as the key to identify the location on Schedule F (if Schedule F is filed).

Items C3-C6 These items identify the location by its address or, if there is no address, by a brief description of the location such as a distance and direction from known landmarks (e.g. "5 km south of Anytown, US").

Items C7, C8, C9 and C10 These items are the geographic coordinates of the location. Items C7 and C8 are the North latitude and West longitude, respectively, with reference to the North American Datum of 1927. Items C7 and C8 are required. Items C9 and C10 are the North latitude and West longitude, respectively, with reference to the North American Datum of 1983. Items C11 and C12 are optional, but may assist processing of the Schedule C.

Items C11-C14 These items key to location data that is to be replaced by the data in items C3-C10 in the data base. The filer should complete these items only if (1) correcting geographical coordinates or (2) relocating *all* facilities at the location indicated by these items to the location specified in items C3-C10. The filer must *not* complete these items if the intent is to relocate some, *but not all*, of the facilities at a particular location. (In such a case, the filer must submit two Schedule Cs with the filing - one to delete the facilities at the previous location and another to add those facilities at the new location.)

TECHNICAL PARAMETERS

Item C15, C16 These items report the actual and effective height at which the antenna is mounted. These items must be completed for all filings except for those in the Air-ground Radiotelephone Service.

Item C17 This item reports the maximum effective radiated power (ERP) of the facility in any direction. This item must be completed for all transmitter filings. The answer must be stated in Watts.

RADIAL DATA

Item C18 This item reports the height of the antenna center of radiation above the average terrain elevation (AAT) along each of the eight cardinal radials. This item must be completed for all Schedule C filings except for those in the Air-ground Radiotelephone Service.

Item C19 This item reports the effective radiated power (ERP) in each of the eight cardinal radial directions. This item must be completed for all Schedule C filings except for those in the Air-ground Radiotelephone Service.

Item C20 This item reports the calculated radial distance to the service area boundary (SAB) from the specified location. This item is required only for filings in the Cellular Radiotelephone Service.

Item C21 This item reports the determined radial distance to the Cellular Geographic Service Area (CGSA) from the specified location. This item is required only for filings in the Cellular Radiotelephone Service.

General Instructions for Schedules D, E, F, G and H

LOC letters A through F carry through on Schedule E Items E2 - E8, Schedule F Items F1 - F13, Schedule G Items G1 - G8, and Schedule H Items H1 - H5. It is requested that the applicant begin by inserting the parameters of the principal base or mobile relay station on LOC line "A" (plus any other different class of station at that location), followed by control station, fixed relay stations, etc. When more than one class of station is proposed to be at a common location, use the same permanent location letter A through F and a separate horizontal line entry for each class of station, and furnish the information required by the schedules for each separate class of station. For example, if it is proposed to install a base station, a mobile relay station, and a fixed relay station at common location "A", the appropriate information must be entered on three (3) separate horizontal lines. The next separate permanent location would use letter "B", etc.

NOTE: Applicants for all control stations in the 470 - 512 MHz band must use LOC letters A - F and furnish the information required by the schedules.

In the 470 - 512 MHz band, applicants for mobile units, itinerant stations and stations at temporary locations must furnish the information requested in Schedule E Items E9 - E12 and Schedule G Items G1 - G6. In the 220 - 222 MHz and above 512 MHz, applicants for control stations with antenna heights meeting the 20 foot criteria and/or for mobile units, itinerant stations and stations for temporary locations must furnish the information requested in Schedule E Items E9 - E12 and Schedule G Items G1 - G6. Below 470 MHz except 220 - 222 MHz, applicants for control stations with antenna heights meeting the 20 foot criteria, itinerant stations, stations at temporary locations, and mobile units must furnish the information requested in Schedule E Items E9 - E12 and Schedule G Items G1 - G5. Since LOC letters A through F are reserved for permanent location stations, entries for control stations meeting the 20 foot criteria (excluding 470 - 512 MHz) may be inserted on one line.

Note: See completed sample applications following Appendix II.

If your application is approved, a license will be mailed to you. This authorization permits you to commence operations. (Note: It is a violation of Federal Law to begin transmitting prior to obtaining an authorization.) If an application is incomplete or filled out incorrectly, it will be returned or dismissed along with the reasons for this action. Applications which are not in good order will take additional time to process. You are, therefore, urged to be very careful when completing the application. Each entry on the Form 600 must be complete in itself. Do NOT use entries such as "On File", "No Changes", "Does Not Apply", "Same as...", etc.

Applications for modification of existing station authorizations MUST include all current station information in addition to all items being modified. (See Schedule D Item D3).

Specific Instructions for Schedule D
Administrative Data

Enter the Licensee Name, Radio Service and Call Sign or Station Location city and state.

PURPOSE OF FILING

Item D1 Enter the purpose of this filing in the brackets.

N = New Station - Place an N in the brackets to indicate that this is an application for a radio station not presently licensed in the service listed in Item 26 on page 1 of the Form 600 Main Form.

M = Modification - Place an M in the brackets to indicate a desired change in the conditions of a license(s) during the current authorized period. See applicable Commission rules. Use Item D3 to describe the change(s) desired. Complete the form in full as for a new station. (Note: Once a license(s) is modified, all previous copies of the license(s) are no longer valid regardless of the expiration date shown.)

R = Renewal - Place an R in the brackets to indicate that you wish to renew an existing authorization that has not expired.

X = Reinstatement of Expired Authorization - Place an X in the brackets to indicate reinstatement of an expired authorization. Complete the form in full as for a new station. **Licenses that have been expired more than 30 days cannot be reinstated.** In these cases, the former licensee should submit a completed application including required frequency coordination for a new license.

A = Assignment of Authorization - Place an A in the brackets to indicate the request for an assignment of the right, title, and interest to a station presently authorized to another person or entity. Prepare the application in your own name and complete it in the same manner as for a new station with all questions answered and include a detailed statement of your eligibility for Item D12. Include a letter from the assignor meeting the requirements of the Commission's rules. For your convenience, FCC Form 1046, "Assignment of Authorization" may be obtained from any Commission office for this purpose.

NOTE: If the purpose of filing is Renewal, Reinstatement of Expired Authorization or Assignment of Authorization and a modification to the license is also required, use Item D3 to describe the changes.

Item D2 If your application is for a new station, leave Item D2 blank. If you are changing to system licensing, list the existing call signs assigned to the system and indicate which of your existing fixed call signs you would prefer to retain by listing that call sign first.

Item D3 If the application is intended to modify a current license(s), indicate the modification(s) proposed. Applications for modification of existing station authorizations must include all current station information in addition to all items being modified. (Note: Certain modifications may require new frequency coordination or notification to the FAA (Part 17 of the FCC Rules and Part 77 of the FAA Rules).

ASSOCIATED CALL SIGNS

Item D4 List any call sign(s) which is part of the system and licensed separately.

POINT OF CONTACT

Items D5-D6 Enter the street address, city, state and voice telephone number (including the area code) of the contact point.

ASSOCIATED BROADCAST STATION

Items D7-D9 Complete these items for the Broadcast Auxiliary Radio Services only. Enter the parent station call sign, parent station city and parent station state.

MARKET AREA

Item D10 This item must be answered only if the filing is for an authorization in one of the radio services that is licensed on a geographic licensing area or "market" basis. It identifies the market to which the filing pertains. The market designators are listed in FCC Public Notices or in the FCC Record. This item should not be answered for filings in radio services licensed on a station by station basis.

PAGING OPERATIONS

Item D11 List the number of paging receivers in this system.

ELIGIBILITY

Item D12 Provide a statement that clearly indicates your qualifications for the chosen service. This statement should include:

(1) A general description of your business or activity.
(2) A description of how radio will be employed in the activity.
(3) Any other information which you believe will aid in a determination of your eligibility for the service requested.

Note: Failure to provide clear and complete details justifying eligibility will result in return or dismissal of your application. Do not use terms such as "No Change" or "On File".

Item D13 Enter the number and paragraph of the FCC Rule Section which describes the eligibility for the particular radio service you specified in Item 26 on page 1 of FCC Form 600 Main Form.

FREQUENCY COORDINATION NUMBER

Item D14 This item will be completed by the appropriate certified frequency coordinators for those applicants who are required to comply with the frequency coordination requirements.

Specific Instructions for Schedule E
Station Location Data

The Form 600 Schedule E has been designed to accommodate six (6) permanent locations. LOC letters A through F are to designate the separate locations. No more than six (6) different permanent locations may be licensed under one call sign. LOC letters A through F for items E2-E8 correspond to LOC letters A through F on Schedules F, G and H. Enter the Licensee Name, Radio Service and Call Sign or Station Location city and state.

Item E1 The latitude and longitude for locations in the United States and the Carribean Islands must be referenced to either the North American Datum of 1927 (NAD 27) or 1983 (NAD 83). Enter "2" for NAD 27 or "8" for NAD 83. For locations in other areas, enter "O" for Other and specify the datum used. Topographical maps will indicate which datum is used. **All coordinates shown on this filing must be calculated using the same datum.**

FIXED OR PERMANENT LOCATIONS

Item E2 Enter the street address or specific geographic description for the transmitter antenna location for each station listed for LOC letters (A) through (F). (P.O. Box or geographic coordinates are not acceptable.)

Item E3 Enter the name of the city or town in which the transmitter antenna is located for LOC letters (A) through (F). For rural or unincorporated areas, enter the nearest city or town to the transmitter antenna location.

Item E4 Enter the name of the county in which the transmitter antenna is located for each station listed for LOC letters (A) through (F).

Item E5 Enter the two letter abbreviation for the state in which the transmitter antenna is located for LOC letters (A) through (F). The abbreviations for each state are provided in Table 1 on the reverse of Form 600 Schedule E.

Item E6 Enter the geographic coordinates of latitude in degrees, minutes, and seconds to the nearest second for LOC letters (A) through (F). "N" for north will be assumed. Enter "S" for south.

Item E7 Enter the geographic coordinates of longitude in degrees, minutes, and seconds to the nearest second for LOC letters (A) through (F). "W" for west will be assumed. Enter "E" for east.

Item E8 Enter to the nearest meter the elevation above mean sea level of the ground at the antenna location for LOC letters (A) through (F). This information can be determined using a 7.5 minute topographical quandrangle map of the area or you may consult the city or county surveyor in your area. Topographical maps may be purchased from the U.S. Geological Survey, Washington, D.C. 20242 or from its office in Denver, Colorado 80225. See antenna figure examples on Schedule F (c = ground elevation above mean sea level).

CONTROLS MEETING THE 20 FOOT CRITERIA, MOBILE OR TEMPORARY LOCATIONS

Item E9 - E12 These items are for mobile units, stations operating at temporary locations, itinerant stations and control stations meeting the 20 foot criteria. Location letters G through Z should correspond with location letters G - Z on Schedule G. For example, H 30 kilometer radius of Station A, I 30 kilometer radius of Station B.

For control stations meeting the 20 foot criteria, enter the location letter associated with the control station(s) frequencie(s) on Schedule G and the primary control state in item E11.

For mobile, temporary and itinerant operations, enter the location letter associated with the mobile, temporary or itinerant frequencie(s) on Schedule G.

AREA OF OPERATION CODES TO BE USED IN COMPLETING ITEM E10:

A - F= Centered around permanent station A - F
P = Centered around the operating area other than A - F.
S = Statewide operations within a single state
N = The 48 contiguous states
L = Includes Hawaii, Alaska, territories or possessions

If the area of operation is centered around permanent stations (A - F), enter the location letter, complete Item E9 with the radius in kilometers of the normal area of operation and E10 with the appropriate permanent station location letter A - F. For example, H 45 kilometer radius of station A.

In the event a specific mile radius of station A is an inadequate description for your system, the application is for mobile only, stations operating at temporary locations or for itinerant stations, enter the location letter, in item E9 enter a radius in kilometers, in item E10 enter "P", in item E11 enter the geographical coordinates (latitude and longitude in degrees, minutes and seconds), the county and state of the center of the operating area. For example, H 50 kilometer radius of 42-29-47, 87-41-16, Cook county, IL.

For statewide operations within a single state, enter the location letter. In item E10 enter "S" and in item E11 enter the abbreviation for the state (See Table 1 on the reverse of Form 600 Schedule E). If the state you are operating in is Alaska, enter "W" in item E12 if your operations are west of Line C. If your operations are east of Line C, enter "E" in item E12 (Line C = 144 degrees Longitude).

If your area covers the 48 contiguous states, enter the location letter, in item E10 enter "N" and in item E11 enter "US" for the state. Complete item E12 with "S" if your operations will be South of Line A. If operations will be North of Line A, complete item E12 with "N". See Appendix 1 for a list of counties by state, having areas north of Line A following Schedule H instructions.

Additionally if your area includes Hawaii, Alaska, territories or possessions, enter the location letter, in item E10 enter "L", and in item E11 enter "US" for the state. If operating in Alaska west of Line C, enter "W" in item E12. If operating in Alaska east of Line C, enter "E" in item E12 (Line C = 144 degrees Longitude).

Specific Instructions for Schedule F (For all applicants)
Antenna Structure Data

Schedule F must be completed and filed when fixed transmitter sites are submitted on Schedules B, C or E. Enter the Licensee Name, Radio Service and Call Sign or Station Location city and state.

If you completed Schedule B or C, Loc Number is used as the key to associate with item B10 on Schedule B and item C10 on Schedule C. Enter a LOC Number.

If you completed Schedule E LOC letters A-F for items F1 - F13 correspond to LOC letters A through F on Schedule E.

Item F1 If your antenna will be mounted on a structure with an existing antenna, enter "E". If you propose to construct a new structure or use one which contains no existing licensees, enter "N". The term "existing antenna" applies to any structure with an antenna which is presently utilized by existing licensees.

Item F2 If item F1 is "E", enter the call sign of one existing licensee using the structure.

Item F3 If item F2 is completed, enter the radio service for that call sign.

Item F4 Enter the full legal name of the owner of the antenna structure. If the owner is:

1. an individual doing business in his/her own name, enter last name, first name, middle initial.
2. an individual doing business under a firm or company name (sole proprietorship), enter both the individual's name and the firm or company name. "Doing business as" may be abbreviated as "dba".
3. a partnership doing business under a firm or company name, enter the full name of the partnership.
4. an unincorporated association, enter the name of the association.
5. a corporation or governmental entity, enter the full legal name of the entity.

Enter the area code and telephone number.

Item F5 See antenna figure examples 1 - 3 on Form 600 Schedule F. Indicate the number of the figure which most resembles your antenna structure.

Item F6 Enter the type of supporting structure on which the antenna is or will be mounted (i.e. building, tower, tank, silo, building/tower, etc).

Item F7 Enter the height above ground in meters, to the highest point of the supporting structure only. For instance, if the antenna structure consists of a building/tower combination, include any elevator shaft, flag pole, or penthouse in the support structure height, but not the antenna, tower, pole or mast. If the antenna structure is a tower only, include the height of the tower but not the antenna. Refer to letter "b" in the antenna figure examples on Form 600 Schedule F.

Item F8 Enter the overall height above ground in meters, of the entire antenna structure to the highest point, including any appurtenances. You must include antennas, dishes, obstruction lighting. Refer to letter "d" in the antenna figure examples on Form 600 Schedule F.

Item F9 Enter the FCC assigned tower number if the tower is existing and the number is known.

Item F10 If a Notice of Construction or Alteration has been filed with the FAA, enter "Y". If a Notice of Construction or Alteration has not been filed, enter "N". You must notify the Federal Aviation Administration on FAA Form 7460-1 (obtainable from any FAA office), with certain limited exceptions as set forth in Part 17 of the FCC Rules and Part 77 of the FAA Rules, of any of the following construction or alterations of an antenna structure:

(1) Construction of any new antenna structure or alteration of any existing antenna structure, which would result in the top of the antenna or the antenna structure exceeding a height of 61 m (200 feet) above ground level at the antenna site.

(2) Construction of any new antenna structure or alteration of any existing structure, which would result in the top of the antenna or the antenna structure exceeding the height of an imaginary surface extending outward and upward at one of the following slopes:

(a) 1 m above the airport elevation for each 100 m from the nearest runway longer than 1 km within 6.1 km of the antenna structure, excluding helicopter and seaplane bases with specified boundaries, if that airport is either listed in the Airport Directory of the current Airman's Information Manual or is operated by a Federal military agency.

(b) 2 m above the airport elevation for each 100 m from the nearest runway shorter than 1 km within 3.1 km of the antenna structure, excluding helicopter and seaplane bases without specified boundaries, if that airport is either listed in the Airport Directory or is operated by a Federal military agency.

(c) 4 m above the airport elevation for each 100 m from the nearest landing and takeoff area within 1.5 km of the antenna structure of each heliport listed in the Airport Directory or that is operated by a Federal military agency.

(3) Any construction of an antenna structure (or any alteration of an antenna structure that would increase its height) on an airport listed in the Airport Directory of the current Airman's Information Manual.

(4) When requested by the FAA, any construction or alteration that would be in an instrument approach area (defined in the FAA standards governing instrument approach procedures) and available information indicates it might exceed an obstruction standard of the FAA. If you intend to install towers of unusual height or at locations in close proximity to aircraft landing areas, it will be to your advantage to discuss the location and height of the antenna in detail with the appropriate FAA area office before filing your application.

Item F11 If item F10 was answered "Y" (yes), enter the date filing was made with the FAA.

Item F12 If item F10 was answered "Y" (yes), enter the name of the regional FAA office where the filing was made.

Item F13 If item F10 was answered "Y" (yes), enter the FAA assigned Aeronautical Study Number if known.

Specific Instructions for Schedule G
Technical Data

Enter the Licensee Name, Radio Service and Call Sign or Station Location city and state.

LOC letters for items G1 through G8 correspond to LOC letters on Schedules E, F and H. Enter the LOC letter if other than letter A.

Item G1 Enter the specific frequency(ies) in megahertz. The requested frequency(ies) must be available in the Commission's rules governing the radio service in which you are seeking eligibility. Use a separate line for each frequency, except that 800 MHz SMRS mobile(s) and control(s) are now designated by frequency range "806-821" and 900 MHz SMRS mobile(s) and control(s) are now designated by frequency range "896-901". Use a different letter (A-F) for each permanent

location and refer to Item G2 of these instructions for different classes of stations. When multiple frequencies are used at one station location, the LOC letter of the previous frequency must be entered.

Item G2 Enter the appropriate class of station code from the following table. Definitions for most of these items are listed in the Commission's rules.

STATION CLASS CODE TABLE

Class of Station	Code
Base	FB
Mobile Relay	FB2
Community Repeater	FB4
Private Carrier (Profit)	FB6
Private Carrier (Non-Profit)	FB7
Control	*FX1
Mobile	MO
Mobile/Vehicular Repeater	MO3
Private Carrier Mobile Operation (Profit)	MO6
Private Carrier Mobile Operation (Non-Profit)	MO7
Operational Fixed	FXO
Fixed Relay	FX2
Fixed	**FX
Radiolocation Land	LR
Radiolocation Weather Radar	WDX
Radiolocation Mobile	MR
Secondary Fixed Signalling (for 800 MHz only)	FX3

*Station associated with a mobile relay that employs the same frequency as the associated mobile station for control purposes.

**Station operating on frequencies available for fixed use for control purposes in accordance with applicable rules.

NOTE: Where appropriate follow each code with "T" for Temporary, "I" for Itinerant, "S" for Standby, "C" for Interconnect, "J" for Temporary Interconnect, "K" for Standby Interconnect, and "L" for Itinerant Interconnect, (e.g., FBT meaning Temporary Base).

Item G3 Enter the number of actual transmitting units at each location. Normally, for a station at a permanent/fixed location (base, mobile relay, etc.) only one transmitter is involved; therefore, the number "1" should be entered on lines (A) through (F). However, if more than one transmitter is placed at the same location, so indicate. The total number of mobile units is normally the sum of the units to be placed in operation at the time of grant plus the units for which purchase orders have already been signed and will be in use within eight (8) months. There are some exceptions provided for in the rules which should be noted.

For this item vehicular, portable, aircraft, and marine units are considered to be mobiles. Paging receivers should not be counted as mobile units, but must be listed separately in Schedule D, Item D11.

Item G4 Enter the bandwidth and class of emission for each station. Normally, land mobile operations are intended to provide voice communications. The new ITU (International Telecommunications Union) emission designators must be used in place of the old designators. The following provides samples of the corresponding new ITU designators for the most commonly used emission designators.

EMISSION DESIGNATORS

	Old	New
Frequency modulated (FM) voice	20F3	20K0F3E
Frequency modulated (FM) voice	13.6F3	13K6F3E
Frequency modulated digitized voice	20F3Y	20K0F1E
Frequency modulated digitized non-voice	20F9Y	20K0F1D
Amplitude modulated single sideband voice	3A3J	3K00J3E
Amplitude modulated (AM) voice	8A3	8K00A3E

Item G5 When operating with single side band (A3J or new designator J3E) emission enter the peak envelope power, in Watts, followed by the letter "X" which represents peak envelope power in accordance with Appendix 1, ITU Radio Regulations. For operations using A0, A1, A2, A3, A9, F0, F1, F2, F3 and F9 emissions, or the following new emission designators N0N, A1A, A2D, A3E, A9W, F1B, F2D, F3E, and F9W, enter the mean RF output power, in Watts, normally supplied by the transmitter to the antenna feedline. (See applicable rules.)

NOTE: The power entered should be the minimum required for satisfactory operations.

Item G6 This information is required, for operations above 10 MHz, from applicants requesting new station authorizations, and for major modifications described in the applicable rules.

Enter the effective radiated power. The ERP is the transmitter output power times the net gain of the antenna system. The net gain of the antenna system is the gain of the antenna minus the transmission losses which include losses attributable to the transmission line, duplexers, cavity filters and isolators. The actual formula is: ERP (watts) equals Power (watts) times Antilog (net gain in dB divided by 10).

Item G7 For operations in 220-222 MHz and above 470 MHz, enter the height of the antenna above ground elevation for the average terrain. See the applicable rules for instructions for computing the height above average terrain for the antenna. All other applicants may omit this item.

Item G8 Enter the overall height above ground to the nearest meter of the highest part of your antenna (antenna structure plus the height of the antenna, if top mounted; the total height to the tip of the antenna, if side-mounted). See antenna figures on Schedule F. (a = antenna height to tip)

Specific Instructions for Schedule H
Additional Antenna Data

General. All Remote Pick Up Broadcast Auxiliary Radio Service fixed location stations and all stations proposing to operate on frequencies below 27.5 MHz must complete Form 600 Schedule H. Failure to do so will result in the return of your application without further action. Land Mobile stations located near international borders that seek protection from interference should also complete Form 600 Schedule H. Form 600 Schedule H may be completed for all other stations if you believe the assumptions made by the FCC would leave your station insufficiently protected internationally. The assumptions are listed under General Information for other than Parts 22 and 24 Applicants. If you do not provide the actual data and an interference problem arises involving another country's station, your station will be protected only to the limit of the FCC's assumptions. You may have to adjust. This is especially important for stations proposed to be operated in any of the state-counties defined in Appendix 1 following Form 600 Schedule H instructions.

Instructions for Completion of Individual Items
Enter the Licensee Name, Radio Service and Call Sign or Station Location city and state.

LOC letters for items H1 - H5 correspond to LOC letters on Schedules E, F and G. Enter the station LOC letter code.

Item H1 Enter the transmitter frequency in megahertz corresponding to the LOC letter codes (A,B,C,etc.) which uniquely define the station

location identified on Schedule E. When multiple frequencies are used at one station location, the station location letter code of the previous frequency must be entered.

Item H2 Enter the angle in the horizontal plane of the transmitting antenna main lobe measured clock-wise with respect to True North in degrees, or enter 360 to indicate the transmitting antenna is non-directional.

Item H3 For directional antennas, enter the total angle in degrees measured horizontally in a plane containing the direction of maximum radiation within which the power radiated in any direction does not fall more than 3 dB below the power radiated in the direction of maximum radiation. This information should be available from the specification sheet included with the antenna at time of purchase.

Item H4 Enter one of the code letters below representing the polarization of the transmitting antenna for those circuits above 27.5 MHz:

E - Elliptical
F - 45 Degrees
H - Horizontal
J - Linear
L - Left hand circular
R - Right hand circular
S - Horizontal and Vertical
T - Right and Left hand circular
V - Vertical
X - Other (Provide a description)

Item H5 Enter the ratio, in decibels, of the power required at the input of loss-free reference antenna to the power supplied to the input of the given antenna to produce, in a given direction, the same field strength or the same power flux-density at the same distance. This information should be available from the specification sheet included with the antenna at the time of purchase.

List of Counties, by State, having areas North of Line A:

IDAHO

Bonner
Boundary
Shoshone

INDIANA

Allen
De Kalb
Steuben

MAINE

Aroostook
Franklin
Hancock
Kennebec
Oxford
Penobscot
Piscataquis
Somerset
Waldo
Washington

MICHIGAN

Alcona
Alger
Alpena
Antrim
Arenac
Baraga
Bay
Branch
Calhoun
Charlevoix
Cheboygan
Chippewa
Claire
Clinton
Crawford
Delta
Dickinson
Eaton
Emmett
Genesee
Gladwin
Gogebic
Gratiot
Hillsdale
Houghton
Huron
Ingham
Ionia
Iosco
Iron
Isabella
Jackson
Kalkaska
Keweenaw
Lapeer

Leelanau
Lenawee
Livingston
Luce
Mackinac
Macomb
Marquette
Menominee
Midland
Missaukee
Monroe
Montcalm
Montmorency
Oakland
Ogemaw
Ontonagon
Oscoda
Otsego
Presque Isle
Roscommon
Saginaw
Sanilac
Schoolcraft
Shiawassee
St. Clair
Tuscola
Washtenaw
Wayne

MINNESOTA

Beltrami
Carlton
Clearwater
Cook
Itasca
Kittson
Koochiching
Lake
Lake of the Woods
Marshall
Pennington
Polk
Roseau
St. Louis

MONTANA

Blaine
Chouteau
Daniels
Flathead
Glacier
Hill
Lake
Liberty
Lincoln
McCone
Phillips
Pondera
Richland
Roosevelt

Sanders
Sheridan
Teton
Toole
Valley

NEW HAMPSHIRE

Carroll
Coos
Grafton

NEW YORK

Alleghany
Cattaraugus
Cayuga
Chautaugua
Clinton
Erie
Essex
Franklin
Genesee
Hamilton
Herkimer
Jefferson
Lewis
Livingston
Madison
Monroe
Niagara
Oneida
Onondaga
Ontario
Orleans
Oswego
Seneca
Steuben
St. Lawrence
Warren
Washington
Wayne
Wyoming
Yates

NORTH DAKOTA

Benson
Bottineau
Burke
Cavalier
Divide
Grand Forks
McHenry
McKenzie
Mountrail
Nelson
Pembina
Pierce
Ramsey
Renville
Rolette
Towner
Walsh
Ward
Williams

OHIO

Ashland
Ashtabula
Cuyahoga
Defiance
Erie
Fulton
Geauga
Hancock
Henry
Huron
Lake
Lorain
Lucas
Medina
Ottawa
Paulding
Portage
Putnam
Sandusky
Seneca
Summit
Trumbull
Williams
Woods

PENNSYLVANIA

Crawford
Erie
Warren

VERMONT

Addison
Caledonia
Chittenden
Essex
Franklin
Grand Isle
Lamoille
Orange
Orleans
Rutland
Washington
Windsor

WASHINGTON

Chelan
Clallam
Douglas
Ferry
Grays Harbor
Island
Jefferson
King
Kitsap
Mason
Okanogan
Pend Oreille
Pierce
San Juan
Skagit
Snohomish
Spokane
Stevens
Whatcom

WISCONSIN

Ashland
Bayfield
Douglas
Florence
Forest
Iron
Vilas

Commission Field Offices

The Commission's field offices and the zip codes are listed below. Correspondence with the field offices should be addressed to: Federal Communications Commission, Engineer-in-Charge. The street address of any office may be found in the local directory, for the city in which the office is located, under the heading United States Government.

ALASKA
Anchorage 99502-1896

ARIZONA
Douglas 85608-0006

CALIFORNIA
San Diego 92111-2216
Livermore 94551-0311
Cerritos 90701-3684
Hayward 94545-1914

COLORADO
Lakewood 80228-2213

FLORIDA
Vero Beach 32961-1730
Miami 33166-4668
Tampa 33607-2356

GEORGIA
Duluth 30136-4958
Powder Springs 30073-0085

HAWAII
Waipahu 96797 1030

ILLINOIS
Park Ridge 60068-1460

LOUISIANA
New Orleans 70123-3333

MAINE
Belfast 04915-0470

MARYLAND
Baltimore 21201-2802
Columbia 21045-9998

MASSACHUSETTS
Quincy 02169-7495

MICHIGAN
Allegan 49010-9437
Farmington Hills 48335-1552

MINNESOTA
St. Paul 55101-1467

MISSOURI
Kansas City 64133-4895

NEBRASKA
Grand Island 68802-1588

NEW YORK
Buffalo 14202-2398
New York 10014-4870

OREGON
Portland 97204-2898

PENNSYLVANIA
Langhorne 19047-1859

PUERTO RICO
Hato Rey 00918-1731

TEXAS
Dallas 75243-3429
Houston 77008-1775
Kingsville 78363-0632

VIRGINIA
Virginia Beach 23455-3725

WASHINGTON
Custer 98240-9303
Kirkland 98034-6927

STATE TABLE

Abbreviations for States and Jurisdictions, and Areas

AL	Alabama
AK	Alaska
AZ	Arizona
AR	Arkansas
CA	California
CO	Colorado
CT	Connecticut
DE	Delaware
DC	District of Columbia
FL	Florida
GA	Georgia
GM	Gulf of Mexico
HI	Hawaii
ID	Idaho
IL	Illinois
IN	Indiana
IA	Iowa
KS	Kansas
KY	Kentucky
LA	Louisiana
ME	Maine
MD	Maryland
MA	Massachusetts
MI	Michigan
MN	Minnesota
MS	Mississippi
MO	Missouri
MT	Montana
NE	Nebraska
NV	Nevada
NH	New Hampshire
NJ	New Jersey
NM	New Mexico
NY	New York
NC	North Carolina
ND	North Dakota
OH	Ohio
OK	Oklahoma
OR	Oregon
PA	Pennsylvania
RI	Rhode Island
SC	South Carolina
SD	South Dakota
TN	Tennessee
TX	Texas
UT	Utah
VT	Vermont
VA	Virginia
WA	Washington
WV	West Virginia
WI	Wisconsin
WY	Wyoming
AS	American Samoa
GU	Guam
UM	Midway Island
MP	Northern Mariana Islands
PR	Puerto Rico
VI	Virgin Islands
UM	Wake Island

FCC 600
Main Form

FEDERAL COMMUNICATIONS COMMISSION

Approved by OMB
0000 0000
Expires dd/mm/yy
Est. Avg. Burden Hours
Per Response: 00 Hrs.

Application for Mobile Radio Service Authorization
or Rural Radiotelephone Service Authorization

FEE Use Only

File Number
(FCC Use Only)

FILING FEE

(a) Fee Type Code	(b) Fee Multiple	(c) Fee Due for Fee Type Code in (a)	(d) Total Amount Due	FEE Use Only
			$	

APPLICANT

1. Legal Name of Applicant	2. Voice Telephone Number ( )	
3. Assumed Name Used for Doing Business (if any)	4. Fax Telephone Number ( )	
5. Mailing Street Address or P.O. Box ATTENTION:		
6. City	7. State	8. Zip Code

9. Name of Contact Representative (if other than applicant)	10. Voice Telephone Number ( )	
11. Firm or Company Name	12. Fax Telephone Number ( )	
13. Mailing Street Address or P.O. Box		
14 City	15. State	16. Zip Code

CLASSIFICATION OF FILING

17. This filing is a (an) [ ] New application Amendment to a pending application

18. Does the applicant believe that this filing should be classified as **MINOR** under 47 U.S.C. § 309? [ ] Yes No Does not apply

19. If not minor under 47 U.S.C. § 309, classification for purposes of competitive bidding: [ ] Initial Modification Renewal

20. If this filing is in reference to an existing station: **Call sign of existing station:**	21. If this filing is an amendment to a pending application: **File number of pending application:** **Date Filed:**

NATURE OF SERVICE

22. This filing is for authorization to provide or use the following type(s) of radio service:
[ ] Commercial mobile Private mobile Both commercial and private mobile Fixed

23. Users are or will be: [ ] Public subscribers Eligibles Internal		24. Status: [ ] Profit Not for profit
25. Interconnected service? [ ] Yes No	26. Radio Service code: [ ]	27. Type of operation code: [ ]

ENVIRONMENTAL POLICY

28 Would a Commission grant of any proposal in this application or amendment have a significant environmental effect as defined by 47 CFR 1.1307? • If "yes", attach environmental assessment as required by 47 CFR 1.1308 and 47 CFR 1.1311.	[ ] Yes	No

ALIEN OWNERSHIP

29. Is the applicant a foreign government or the representative of any foreign government?	[ ] Yes	No
30. Is the applicant an alien or the representative of an alien?	[ ] Yes	No
31. Is the applicant a corporation organized under the laws of any foreign government?	[ ] Yes	No
32. Is the applicant a corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country?	[ ] Yes	No
33. Is the applicant a corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country? • If "yes", attach exhibit explaining nature and extent of alien or foreign ownership or control.	[ ] Yes	No

BASIC QUALIFICATIONS

34. Has the applicant or any party to this application or amendment had any FCC station authorization, license or construction permit revoked or had any application for an initial, modification or renewal of FCC station authorization, license, construction permit denied by the Commission? • If "yes", attach exhibit explaining circumstances.	[ ] Yes	No
35. Has the applicant, or any party to this application or amendment, or any party directly or indirectly controlling the applicant ever been convicted of a felony by any state or federal court?	[ ] Yes	No
36. Has any court finally adjudged the applicant, or any person directly or indirectly controlling the applicant, guilty of unlawfully monopolizing or attempting unlawfully to monopolize radio communication, directly or indirectly, through control of manufacture or sale of radio apparatus, exclusive traffic arrangement or any other means or unfair methods of competition?	[ ] Yes	No
37. Is the applicant, or any person directly or indirectly controlling the applicant, currently a party in any pending matter referred to in the preceding two items?	[ ] Yes	No
38. Does the applicant certify that, in the case of an individual applicant, he or she is not subject to a denial of federal benefits that includes FCC benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862, or, in the case of a corporation, partnership or unincorporated association, no party to the application is subject to a denial of federal benefits that includes FCC benefits pursuant to that section?	[ ] Yes	No

CERTIFICATION

The APPLICANT waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application. The applicant certifies that grant of this application would not cause the applicant to be in violation of the spectrum aggregation limit in 47 CFR Part 20. All statements made in exhibits are a material part hereof and are incorporated herein as if set out in full in this application. The undersigned, individually and for the applicant, hereby certifies that all statements made in this application and in all attached exhibits are true, complete and correct to the best of his or her knowledge and belief, and are made in good faith.

39. Applicant is a (an) [ ] Individual Unincorporated Association Partnership Corporation Governmental Entity

40. Typed Name of Person Signing	41. Title
42. Signature	43. Date

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S.Code, Title 18, Section 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. Code, Title 47, Section 312(a)(1)), AND/OR FORFEITURE (U.S. Code, Title 47, Section 503).

FCC 600 Schedule A	FEDERAL COMMUNICATIONS COMMISSION **Administrative Information** Personal Communications Service Cellular Radiotelephone Service Paging and Radiotelephone Service Rural Radiotelephone Service Offshore Radiotelephone Service Air-ground Radiotelephone Service	[illegible] FCC Use Only

PURPOSE OF FILING

A1. The purpose of this filing is to:

[ ]

Enter one or more letters that correctly describe the purpose of this filing.

MAJOR

- A request an initial authorization for a new system or station; additional channels or spectrum (all)
- B request authorization or amend a pending application to change a channel or channel block (all)
- C request a partial assignment of a radio station authorization (all)
- D request authorization for facilities for which environmental assessment is required (all)
- E request authorization for facilities for which international coordination is required (all)
- F request a developmental authorization (CD, CL, CR)
- G request regular authorization for facilities operating under developmental authority (CD, CL, CR)
- H amend a pending application to substantially change the technical proposal (CD, CR)
- I request authorization for a cellular facility that would produce a de minimis SAB extension (CL)
- J amend a pending application to modify a CGSA to include area not previously proposed (CL)
- K request that a CGSA boundary be determined using an alternative method (CL)
- L request authorization for a new or expanded service area on a requested channel (CD)
- M request authorization for one or more new or relocated fixed stations (CD)
- N request authorization to increase the ERP and/or antenna height AAT of a fixed station (CD)
- O request authority to provide commercial paging service using a broadcast station subcarrier (CD)
- P request authorization for a Commercial Aviation ground station location to be established (CG)
- Q request authorization for a new or relocated General Aviation ground station (CG)
- R request authorization for a new/relocated rural/offshore central office/interoffice station (CR, CO)

MINOR

- S request authorization for one or more minor change(s) to an existing system or station (all)
- T effect a minor amendment of a pending application (all)
- U request an extension of time to complete construction of one or more facilities (all)
- V request authorization for a new or relocated rural or offshore subscriber station (CR, CO)
- W request to consolidate separately authorized facilities (all)

MARKET / CHANNEL BLOCK

A2. Market Designator	A3. Channel Block	A4. Sub-Market Designator	A5. Market Name

CONTROL POINTS

A6. Control Point Number	A7. Location Street Address, City or Town, State	A8. Telephone Number	A9. Action Requested Add Delete
		( )	
		( )	
		( )	

FACILITIES NOT CONSTRUCTED

A10. Location Number	A11. File Number	A12. Location Street Address, City or Town, State

FCC 600

Schedule B

FEDERAL COMMUNICATIONS COMMISSION

Technical Data

(Individual Channel Assignment)

Personal Communications Service (Narrowband)
Paging and Radiotelephone Service
Rural Radiotelephone Service
Air-ground Radiotelephone Service (General Aviation)
Offshore Radiotelephone Service

Approved by OMB
3060-0600
Expires dd/mm/yy
Est. Avg. Burden Hours
Per Response 69 hrs

FCC Use Only

LOCATION

B1. Action Requested [ ] Add Delete Modify	B2. FCC Location Number (Key to Schedule F)
B3. Street Address or other Description of Location	
B4. City	
B5. County	B6. State

B7. NAD 27 North Latitude (DD-MM-SS)	B8. NAD 27 West Longitude (DDD-MM-SS)	FCC Use Only
____ o ____ ' ____ "	____ o ____ ' ____ "	
B9. NAD 83 North Latitude (DD-MM-SS)	B10. NAD 83 West Longitude (DDD-MM-SS)	
____ o ____ ' ____ "	____ o ____ ' ____ "	

If changing antenna location, provide coordinates, FCC location number and datum for old location:

B11. North Latitude (DD-MM-SS)	B12. West Longitude (DDD-MM-SS)	B13. FCC Location Number
____ o ____ ' ____ "	____ o ____ ' ____ "	B14. Datum (NAD 27 or NAD 83)

SUPPLEMENTARY LOCATION INFORMATION

B15. Is this location North of Line A or East of Line C? [ ] Yes, North of Line A Yes, East of Line C No
B16. Is this location within 200 kilometers of the U.S.-Mexico border? [ ] Yes No

Complete the following for any adjacent markets within 200 kilometers of this location:

B17. Adjacent Market Designator	B18. Adjacent Market Name	B19. Shortest Distance to Adjacent Market (kilometers)

ANTENNA

B20 Action Requested [ ] Add Delete Modify	B21. Status: [ ] Existing Proposed	B22. Antenna Number
B23. Type	B24. Manufacturer	B25. Model Number
B26. Height of Center of Radiation AAT (meters)	B27. Beamwidth of Main Lobe (degrees)	B28. Height to Tip AGL (meters)

TRANSMITTERS FOR ANTENNA

B29. Transmitter Number	B30. Action Requested Add Delete Modify	B31. Channel Center Frequency (MHz)	B32. Transmitter Class Code	B33. Non-standard Emission Type Designator	B34. Maximum Transmitting ERP
I					
II					
III					
IV					

RADIAL DATA FOR ANTENNA

Azimuth (degrees from true North)	B35. Antenna Height AAT (meters)	B36. Transmitter I ERP (Watts)	B37. Transmitter II ERP (Watts)	B38. Transmitter III ERP (Watts)	B39. Transmitter IV ERP (Watts)
0°					
45°					
90°					
135°					
180°					
225°					
270°					
315°					

POINTS OF COMMUNICATION FOR ANTENNA

B40. Action Requested Add Delete	B41. Transmitter Number	B42. Location (City or Town, State)	B43. North Latitude (DD°MM'SS")	B44. West Longitude (DDD°MM'SS")	B45. Subscriber Call Sign

FCC 600 Schedule C

FEDERAL COMMUNICATIONS COMMISSION

Technical Data

(Block Channel Assignment)

Cellular Radiotelephone Service
Personal Communications Service (Broadband)
Air-ground Radiotelephone Service (Commercial Aviation)

FCC Use Only

LOCATION

C1. Action Requested [ ] Add Delete Modify	C2. FCC Location Number (Key to Schedule F)
C3. Street Address or other Description of Location	
C4. City	
C5. County	C6. State

C7. NAD 27 North Latitude (DD-MM-SS)	C8. NAD 27 West Longitude (DDD-MM-SS)	FCC Use Only
____ o ____ ' ____ "	____ o ____ ' ____ "	
C9. NAD 83 North Latitude (DD-MM-SS)	C10. NAD 83 West Longitude (DDD-MM-SS)	
____ o ____ ' ____ "	____ o ____ ' ____ "	

If changing antenna location, provide coordinates, FCC location number and datum for old location:

C11. North Latitude (DD-MM-SS)	C12. West Longitude (DDD-MM-SS)	C13. FCC Location Number
____ o ____ ' ____ "	____ o ____ ' ____ "	C14. Datum (NAD 27 or NAD 83)

TECHNICAL PARAMETERS

C15. Height of Antenna Center of Radiation AAT (meters)	C16. Height to Top of Antenna AGL (meters)	C17. Maximum ERP (Watts)

RADIAL DATA

Azimuth (degrees from true North)	C18. Antenna Height AAT (meters)	C19. Transmitting ERP (Watts)	C20. Distance to SAB (kilometers)	C21. Distance to CGSA (kilometers)
0°				
45°				
90°				
135°				
180°				
225°				
270°				
315°				

FCC 600 — **Schedule D**

FEDERAL COMMUNICATIONS COMMISSION

Administrative Data

(all services except those for which Scehedule A is required)

Approved by OMB
0000 0000
Expires dd/mm/yy
Est. Avg. Burden Hours
Per Response: 60 Hrs

FCC Use Only

Licensee Name	Radio Service	Call Sign or Station Location (City, State)

PURPOSE OF FILING

D1. The purpose of this filing is to:

- [ ] N request a new station license.
- [ ] M modify an existing licensed station(s).
- [ ] R renew an existing licensed station.
- [ ] X reinstate an expired call sign.
- [ ] A assign an existing license.

D2. If system licensing, list call signs of stations to be combined. (First call sign will be retained.)

D3. Specify proposed modifications, if any:

ASSOCIATED CALL SIGNS

D4. Call signs:

RADIO SYSTEM OPERATION POINT OF CONTACT

D5. Street Address, City, State	D6. Voice Telephone Number ( )

ASSOCIATED BROADCAST STATION

D7. Call Sign	D8. City	D9. State

MARKET AREA

D10. Market Area / Number

PAGING OPERATIONS

D11. Number of Paging Receivers

ELIGIBILITY

D12. Describe Activity	D13. Rule Section

FOR FREQUENCY COORDINATOR'S USE ONLY

D14. Frequency Coordination Number [ ]

FCC 600 Schedule E

FEDERAL COMMUNICATIONS COMMISSION

Station Location Data

(all services except those for which Scehedule A is required)

Approved by OMB
3060-0600
Expires dd/mm/yy
Est. Avg. Burden Hours Per Response: 60 Hrs

FCC Use Only

Licensee Name	Radio Service	Call Sign or Station Location (City, State)

E1. Specify the datum used to determine all coordinates on this filing: [ ] NAD27 NAD83 Other (Specify _____)

FIXED OR PERMANENT LOCATIONS

LOC	E2. Station Address / Geographic Location	E3. City	E4. County	E5. State
A				
B				
C				
D				
E				
F				

LOC	E6. Latitude (degrees, minutes, seconds)	E7. Longitude (degrees, minutes, seconds)	E8. Ground Elevation (meters)
A			
B			
C			
D			
E			
F			

CONTROLS MEETING THE 20 FOOT CRITERIA, MOBILE OR TEMPORARY LOCATIONS

LOC	E9. Radius (km)	E10. Area of Operation Code	E11. LATITUDE	LONGITUDE	COUNTY	STATE	E12. Operations (S) South of Line A and/or (W) West of Line C
G			- -	- -			
			- -	- -			
			- -	- -			
			- -	- -			
			- -	- -			
			- -	- -			

FCC 600 Schedule F

FEDERAL COMMUNICATIONS COMMISSION

Antenna Structure Data

(All Services)

Approved by OMB 0000 0000
Expires dd/mm/yy
Est. Avg. Burden Hours Per Response: 90 Hrs

FCC Use Only

Licensee Name	Radio Service	Call Sign or Station Location (City, State)

STATUS AND IDENTIFYING INFORMATION

LOC	F1. Location Number	F2. New or Existing	F3. Call Sign of Existing Station	F4. RS Code	F5. Tower Owner's Name and Telephone Number
A					( )
B					( )
C					( )
D					( )
E					( )
F					( )

Figure 1

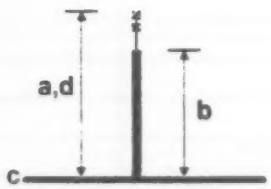


Figure 2

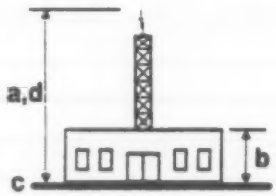
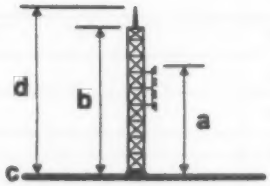


Figure 3



a = height to tip of antenna (AGL)

b = height of support structure (AGL)

c = ground elevation (AMSL)

d = overall height of structure including all appurtenances (AGL)

STRUCTURE TYPE AND HEIGHT

LOC	F6. Figure Number	F7. Structure Type	F8. Height of Support Structure (b) (meters)	F9. Overall Height of Structure (d) (meters)
A				
B				
C				
D				
E				
F				

FAA NOTIFICATION

LOC	F10. Was FAA notified?	F11. Date FAA Notification Filed	F12. FAA Regional Office Notified	F13. FAA Study Number
A				
B				
C				
D				
E				
F				

FCC 600
Schedule G

FEDERAL COMMUNICATIONS COMMISSION

Technical Data

(all services except those for which Scehedule A is required)

Approved by OMB
0060-0600
Expires 08/31/97
Est. Avg. Burden Hours
Per Response: 60 hrs

FCC Use Only

Licensee Name	Radio Service	Call Sign or Station Location (City, State)

LOC	G1. Frequency (MHz)	G2. Class	G3. No. Units	G4. Emission	G5. Output	G6. ERP	G7. AAT (meters)	G8. Ant. Ht. (meters)
A								

LOC	G1. Frequency (MHz)	G2. Class	G3. No. Units	G4. Emission	G5. Output	G6. ERP	G7. AAT (meters)	G8. Ant. Ht. (meters)

FCC 600

Schedule H

FEDERAL COMMUNICATIONS COMMISSION

Additional Antenna Data

(Remote Pickup Broadcast Auxiliary)
(Land Mobile Stations Operating on Frequencies Under 27.5 MHz)
(Land Mobile Stations Located Near International Borders that Seek Protection from Interference)

Approved by OMB
0060 0000
Expires dd/mm/yy
Est. Avg. Burden Hours
Per Response: 60 Hrs

FCC Use Only

Licensee Name	Radio Service	Call Sign or Station Location (City, State)

LOC	H1. Frequency (MHz)	H2. Azimuth	H3. Beamwidth (degrees)	H4. Polarization	H5. Gain (dB)

LOC	H1. Frequency (MHz)	H2. Azimuth	H3. Beamwidth (degrees)	H4. Polarization	H5. Gain (dB)

APPENDIX B

CMRS TRANSITION RULES

Rule Amendments

47 CFR Parts 1, 20, 22, 24, and 90 are amended as follows:

Part 1 - PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:
Authority: 47 U.S.C. 154, 303, 503(b)(5); 5 U.S.C. 552; 31 U.S.C. 853a, unless otherwise noted.

2. Section 1.823 is amended by removing and reserving paragraph (b) (2).

3. Section 1.901 is revised to read as follows:

§ 1.901 Scope.

In the case of any conflict between the rules set forth in this subpart and the rules set forth in Part 13 of this chapter or the rules set forth for specific services in Parts 80 through 97 of this chapter (other than rules relating to Commercial Mobile Radio Services contained in Part 90 of this chapter), the rules in this subpart shall govern. In the case of any conflict between the rules set forth in this subpart and the rules relating to Commercial Mobile Radio Services set forth in Part 20 of this chapter or in Part 90 of this chapter, the rules in Part 20 or Part 90 of this chapter shall govern.

4. Section 1.922 is revised to read as follows:

§ 1.922 Forms to be used.

FCC Form	Title
175	Application To Participate in an FCC Auction.
175-S	Supplemental Application To Participate in an FCC Auction.
402	Application for Microwave Station Authorization in the Safety and Special Radio Services.
402-10	Instructions for Completion of FCC Form 402.
402-A	Annual Report of Licensees of Microwave and Other Fixed Stations When Such Facilities Are Used Cooperatively With Other Persons.
402-R	Renewal Notice and Certification in the Private Operational-Fixed Microwave Radio Service.

404	Application for Aircraft Radio Station License.
404-A	Temporary Aircraft Radio Station Operating Authority.
405-A	Application for Renewal of Station License.
405-B	License Expiration Notice and/or Renewal Application.
406	Application for Ground Station Authorization in the Aviation Services.
410	Registration of Canadian Radio Station Licensee and Application for Permit to Operate.
410-B	Application for Permit To Operate a Canadian General Radio Station in the United States.
452-R	Application for Renewal of Coast and Ground Services.
480	Application for Civil Air Patrol Radio Station Authorization.
490	Application for Assignment or Transfer of Control.
503	Application for Land Radio Station License in the Maritime Services.
506	Application for Ship Radio Station License.
506-A	Temporary Operating Authority, Ship Radio Station License and Restricted Radiotelephone Operator Permit.
525	Application for Disaster Communications Radio Station Construction Permit and License.
572	Temporary Permit To Operate a Business Radio Station.
572C	Conditional Temporary Authorization To Operate a Part 90 Radio Station.
574	Application for Radio Station Authorization in the General Mobile Radio Services.
574-R	Application for Renewal of Radio Station License.
574-T	Temporary Permit To Operate a General Mobile Radio Service System.
577	Temporary Permit To Operate a Part 90 Radio Station.
600	Application for Mobile Radio Service Authorization .
610	Application for Amateur Radio Station and/or Operator License.
610-A	Application of Alien Amateur Radio Licensee for Permit To Operate in the United States.
610-B	Application for Amateur Club, Military Recreation, or Radio Amateur Civil Emergency Service Station License.
660-B	Interim Amateur Permit.
702	Application for Consent to Assignment of Radio Station Construction Permit or License (For Stations in Services Other Than Broadcast).
703	Application for Consent To Transfer of Control of Corporation Holding Construction Permit or Station License (For Station in Services Other Than Broadcast).
714	Supplement to Application for New or Modified Radio Station Authorization (Concerning Antenna Structure Notification to FAA).
820	Application for Exemption from Ship Radio Station Requirements.
845	Amateur Code Credit Certificate.
1046	Assignment of Authorization.

5. Section 1.924 is amended by revising the heading in paragraph (b)(2)(i) and paragraph (b)(2)(vi) and by adding a new paragraph (b)(2)(vii) to read as follows:

§ 1.924 Assignment or transfer of control; voluntary or involuntary.

*****

(b) * * *

(2) * * *

(i) *FCC Form 600.* * * *

*****

(vi) *FCC Form 703.* For consent to transfer control of a corporation holding any type of Part 90 license except a license to provide commercial mobile radio service.

(vii) *FCC Form 490.* For consent to transfer control of a corporation holding a Part 90 license to provide commercial mobile radio service.

*****

6. Section 1.925 is amended by revising the first sentence of paragraph (g) and (h) to read as follows:

§ 1.925 Application for special temporary authorization, temporary permit, or temporary operating authority.

*****

(g) An applicant for a Business Radio Station license (other than an applicant who seeks to provide commercial mobile radio service as defined in Part 20 of this chapter) utilizing an already authorized facility may operate the station for a period of 180 days, under a temporary permit, evidenced by a properly executed certification made on FCC Form 572, after the mailing of a formal application for station license together with evidence of frequency coordination, if required, to the Commission. * * *

(h) An applicant for a radio station license under Part 90, Subpart S, of this chapter (other than an applicant who seeks to provide commercial mobile radio service as defined in Part 20 of this chapter) to utilize an already existing Specialized Mobile Radio System (SMRS) facility or to utilize an already licensed transmitter may operate the radio station for a period of up to 180 days, under a temporary permit, evidenced by a properly executed certification of FCC Form 572 after the mailing of a formal application for station license, provided that the antenna employed by the control station is a maximum of 20 feet (6.1 meters) above a man-made structure (other than an antenna tower) to which it is affixed.

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7. Section 1.1105 is amended by revising the entries in the table from 2. through 5.n.

to read as follows:

Action	FCC Form No.	Fee Amount	Fee Type Code	Address
• •	•	•	•	• •
2. Domestic Public Land Mobile Stations (Paging and Radiotelephone Service, Air-ground Radiotelephone Service):				
a. Application for new or additional facility (per transmitter).	FCC 600	265.00	CMD	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
b. Application for major modification of an existing facility (per transmitter).	FCC 600	265.00	CMD	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
c. Notification of additional transmitter (per transmitter).	FCC 489	265.00	CMD	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
d. Major amendment of a pending application (per transmitter).	FCC 600	265.00	CMD	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
e. Application for assignment of authorization or consent to transfer of control.				
(i) First call sign	FCC 490	265.00	CMD	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
(ii) Each additional call sign	FCC 490	45.00	CAD	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
f. Application for partial assignment of authorization (per call sign).	FCC 600 & FCC 490	265.00	CMD	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
g. Application for renewal (per call sign).	FCC 405 & FCC 159	45.00	CAD	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
h. Minor modification (per transmitter).				
(i) Notification of minor modification	FCC 489	45.00	CAD	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
(ii) Application for minor modification	FCC 600	45.00	CAD	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
i. Request for special temporary authority (per channel/per location).	written request & FCC 159	230.00	CLD	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.

Action	FCC Form No.	Fee Amount	Fee Type Code	Address
j. Application for extension of construction period (per authorization).	FCC 600	45.00	CAD	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
k. Notification of commencement of service to subscribers (per notification).	FCC 489	45.00	CAD	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
l. Application for new or modified auxiliary test transmitter (per transmitter).	FCC 600	230.00	CLD	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
m. Application for authority to provide commercial mobile service using broadcast station subcarriers (per application).	FCC 600	115.00	CFD	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
n. Application for reinstatement [NO LONGER AVAILABLE].				
o. Application to combine separate authorizations (per call sign).	FCC 600	230.00	CLD	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
p. Application for new or modified standby transmitter (per transmitter/per location).	FCC 600	230.00	CLD	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
q. 931 MHz nationwide paging renewal [SEE 2g].				
r. Application for new, modified or renewal general aviation air-ground mobile license (per application).	FCC 409 & FCC 159	45.00	CAD	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
s. Application for 932-932.5 / 941-941.5 MHz point-to-multipoint channels (per transmitter.	FCC 600	265.00	CMP	Federal Communications Commission, 932/941 MHz Point-to-Multipoint Channels, Common Carrier Bureau, P.O. Box 358924, Pittsburgh, PA 15261-5924.
3. Cellular Systems [Cellular Radiotelephone Service]:				
a. Initial application for new cellular system.	FCC 600	265.00	CMC	Federal Communications Commission, Cellular Systems, P.O. Box 358135, Pittsburgh, PA 15251-5135.
b. Application for major modification.	FCC 600	265.00	CMC	Federal Communications Commission, Cellular Systems, P.O. Box 358135, Pittsburgh, PA 15251-5135.
c. Minor modifications.				
(i) Application for minor modification	FCC 600	70.00	CDC	Federal Communications Commission, Cellular Systems, P.O. Box 358135, Pittsburgh, PA 15251-5135.
(ii) Notification of minor modification or commencement of service to subscribers (per notification).	FCC 489	70.00	CDC	Federal Communications Commission, Cellular Systems, P.O. Box 358135, Pittsburgh, PA 15251-5135.

Action	FCC Form No.	Fee Amount	Fee Type Code	Address
d. Application for full or partial assignment of authorization or consent to transfer of control.	FCC 490	285.00	CMC	Federal Communications Commission, Cellular Systems, P.O. Box 358135, Pittsburgh, PA 15251-5135.
e. Application for renewal.	FCC 405 & FCC 159	45.00	CAC	Federal Communications Commission, Cellular Systems, P.O. Box 358135, Pittsburgh, PA 15251-5135.
f. Application for extension of construction period.	FCC 600	45.00	CAC	Federal Communications Commission, Cellular Systems, P.O. Box 358135, Pittsburgh, PA 15251-5135.
g. Request for special temporary authority.	written request & FCC 159	230.00	CLC	Federal Communications Commission, Cellular Systems, P.O. Box 358135, Pittsburgh, PA 15251-5135.
h. Request to combine cellular geographic service areas (per system).	written request & FCC 159	60.00	CBC	Federal Communications Commission, Cellular Systems, P.O. Box 358135, Pittsburgh, PA 15251-5135.
4. Rural Radio [Rural Radiotelephone Service]:				
a. Application for new or additional facility (per transmitter).	FCC 600	125.00	CGR	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
b. Application for major modification of an existing facility (per transmitter).	FCC 600	125.00	CGR	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
c. Major amendment of a pending application (per transmitter).	FCC 600	125.00	CGR	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
d. Minor modifications.				
(i) Notification of minor modification (per transmitter).	FCC 489	45.00	CAR	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
(ii) Application for minor modification (per transmitter).	FCC 600	45.00	CAR	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
e. Application for assignment of authorization or consent to transfer of control.				
(i) First call sign:	FCC 490	125.00	CGR	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
(ii) Each additional call sign:	FCC 490	45.00	CAR	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
(iii) Partial assignment of authorization (per call sign):	FCC 490 & FCC 600	125.00	CGF	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.

Action	FCC Form No.	Fee Amount	Fee Type Code	Address
f. Application for renewal (per call sign).	FCC 405 & FCC 159	45.00	CAR	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
g. Application for extension of construction period (per application).	FCC 600	45.00	CAR	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
h. Notification of commencement of service to subscribers (per notification).	FCC 489	45.00	CAR	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
i. Request for special temporary authority (per channel/per location)	written request & FCC 159	230.00	CLR	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
j. Application for reinstatement [NO LONGER AVAILABLE].				
k. Application to combine separate authorizations (per call sign).	FCC 600	230.00	CLR	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
l. Application for new or modified auxiliary test transmitter (per transmitter).	FCC 600	230.00	CLR	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
m. Application for new or modified standby transmitter (per transmitter).	FCC 600	230.00	CLR	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
5. Offshore Radiotelephone Service:				
a. Application for new or additional facility (per transmitter).	FCC 600	125.00	CGF	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
b. Application for major modification of an existing facility (per transmitter).	FCC 600	125.00	CGF	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
c. Fill-in transmitters [NOT AVAILABLE]				
d. Major amendment of a pending application (per transmitter).	FCC 600	125.00	CGF	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
e. Minor modifications.				
(i) Notification of minor modification (per transmitter).	FCC 489	45.00	CAF	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
(ii) Application for minor modification (per transmitter).	FCC 600	45.00	CAF	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
f. Application for assignment of authorization or consent to transfer of control.				

Action	FCC Form No.	Fee Amount	Fee Type Code	Address
(i) First call sign:	FCC 490	125.00	CGF	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
(ii) Each additional call sign:	FCC 490	45.00	CAF	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
(iii) Partial assignment of authorization (per call sign):	FCC 490 & FCC 600	125.00	CGF	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
g. Application for renewal (per call sign).	FCC 405 & FCC 159	45.00	CAF	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
h. Application for extension of construction period (per application).	FCC 600	45.00	CAF	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
i. Application for reinstatement [NO LONGER AVAILABLE]				
j Notification of commencement of service to subscribers (per notification).	FCC 489	45.00	CAF	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
k. Request for special temporary authority (per channel/per location).	written request & FCC 159	230.00	CLF	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
l. Application to combine separate authorizations (per call sign).	FCC 600	230.00	CLF	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
m. Application for new or modified auxiliary test transmitter (per transmitter).	FCC 600	230.00	CLF	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
n. Application for new or modified standby transmitter (per transmitter).	FCC 600	230.00	CLF	Federal Communications Commission, Common Carrier Land Mobile, P.O. Box 358130, Pittsburgh, PA 15251-5130.
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Part 20 - COMMERCIAL MOBILE RADIO SERVICES

1. The authority citation for Part 20 continues to read as follows:

Authority: Secs. 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. New Section 20.6 is added to read as follows:

§ 20.6 CMRS spectrum aggregation limit.

(a) *45 MHz limitation*. No licensee in the broadband PCS, cellular, or SMR services (including all parties under common control) regulated as CMRS (see § 20.9) shall have an attributable interest in a total of more than 45 MHz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any geographic area.

(b) *SMR spectrum*. To calculate the amount of attributable SMR spectrum for purposes of paragraph (a) of this section, an entity must count all 800 MHz channels and 900 MHz channels located at any SMR base station inside the geographic area (MTA or BTA) where there is significant overlap. All 800 MHz channels located on at least one of those identified base stations count as 50 kHz (25 kHz paired), and all 900 MHz channels located on at least one of those identified base stations count as 25 kHz (12.5 kHz paired), except that no more than 10 MHz of SMR spectrum in the 800 MHz SMR service will be attributed to an entity when determining compliance with the cap.

(c) *Significant overlap*. (1) For purposes of paragraph (a) of this section, significant overlap of a PCS licensed service area and CGSA(s) (as defined in § 22.911 of this chapter) or SMR service area(s) occurs when at least 10 percent of the population of the PCS licensed service area, as determined by the 1990 census figures for the counties contained therein, is within the CGSA(s) and/or SMR service area(s).

(2) The Commission shall presume that an SMR service area covers less than 10 percent of the population of a PCS service area if none of the base stations of the SMR licensee is located within the PCS service area. For an SMR licensee's base stations that are located within a PCS service area, the channels licensed at those sites will be presumed to cover 10 percent of the population of the PCS service area, unless the licensee shows that its protected service contour for all of its base stations covers less than 10 percent of the population of the PCS service area.

(d) *Ownership attribution*. For purposes of paragraph (a) of this section, ownership and other interests in broadband PCS licensees, cellular licensees, or SMR licensees will be attributed to their holders pursuant to the following criteria:

(1) Controlling interest shall be attributable. Controlling interest means majority voting equity ownership, any general partnership interest, or any means of actual working control (including negative control) over the operation of the licensee, in whatever manner exercised.

(2) Partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS, cellular, or SMR licensee shall be attributed, except that ownership will not be attributed unless the partnership and other ownership interests and any stock interest amount to at least 40 percent of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS, cellular, or SMR licensee if the ownership interest is held by a small business, a rural telephone company, or a business owned by minorities and/or women, as these terms are defined in § 1.2110 of this chapter or other related provisions of the Commission's Rules, or if the ownership interest is held by an entity with a non-controlling equity interest in a broadband PCS licensee or applicant that is a business owned by minorities and/or women.

(3) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock to any person who has the sole power to sell such stock, and, in the case of stock held in trust, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(4) Non-voting stock shall be attributed as an interest in the issuing entity if in excess of the amounts set forth in paragraph (d)(2) of this section.

(5) Debt and instruments such as warrants, convertible debentures, options, or other interests (except non-voting stock) with rights of conversion to voting interests shall not be attributed unless and until conversion is effected, except that this provision does not apply in determining whether an entity is a small business, a rural telephone company, or a business owned by minorities and/or women, as these terms are defined in § 1.2110 of this chapter or other related provisions of the Commission's Rules.

(6) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(7) Officers and directors of a broadband PCS licensee or applicant, cellular licensee, or SMR licensee shall be considered to have an attributable interest in the entity with which they are so associated. The officers and directors of an entity that controls a broadband PCS licensee or applicant, a cellular licensee, or an SMR

licensee shall be considered to have an attributable interest in the broadband PCS licensee or applicant, cellular licensee, or SMR licensee.

(8) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(e) *Divestiture.* Any party holding controlling or attributable ownership interests in SMR licensees accounting for more than 5 MHz of SMR spectrum may be a party to a broadband PCS application (*i.e.*, have a controlling or attributable interest in a broadband PCS applicant), and such PCS applicant will be eligible for PCS licenses amounting to 40 MHz of broadband PCS spectrum in a geographical area, pursuant to the divestiture procedures set forth in paragraphs (e)(1) through (e)(3) of this section.

(1) The broadband PCS applicant shall certify on its bidder application that it and all parties to the application will come into compliance with the limitations on spectrum aggregation set forth in this section.

(2) If such an applicant is a successful bidder, it must submit with its long-form application a signed statement describing its efforts to date and future plans to come into compliance with the limitations on spectrum aggregation set forth in this section.

(3) If such an applicant is otherwise qualified, its application will be granted subject to a condition that the licensee shall come into compliance with the limitations on spectrum aggregation set forth in this section within ninety (90) days of final grant.

(i) Parties holding controlling interests in SMR licensees that conflict with the attribution threshold or geographic overlap limitations set forth in this section will be considered to have come into compliance if they have submitted to the Commission an application for assignment of license or transfer of control of the SMR licensee (see § 90.158 of this chapter) by which, if granted, such parties no longer would have an attributable interest in the SMR license. If no such assignment or transfer application is tendered to the Commission within ninety (90) days of final grant, the Commission may consider the short-form certification and the long-form divestiture statement to be material, bad faith misrepresentations and shall invoke the condition on the PCS license, cancelling it automatically, shall retain all monies paid to the Commission,

and, based on the facts presented, shall take any other action it may deem appropriate. Divestiture may be to an interim trustee if a buyer has not been secured in the required period of time, as long as the applicant has no interest in or control of the trustee, and the trustee may dispose of the license as it sees fit.

(ii) Where parties to broadband PCS applications hold less than controlling (but still attributable) interests in SMR licensee(s), they shall submit, within ninety (90) days of final grant, a certification that the applicant and all parties to the application have come into compliance with the limitations on spectrum aggregation set forth in this section.

[NOTE 1 to Section 20.6: For purposes of the ownership attribution limit, all ownership interests in operations that serve at least 10 percent of the population of the PCS service area should be included in determining the extent of a PCS applicant's cellular or SMR ownership.]

[NOTE 2 to 20.6: When a party owns an attributable interest in more than one cellular or SMR system that overlaps a PCS service area, the total population in the overlap area will apply on a cumulative basis.]

Part 22 - PUBLIC MOBILE RADIO SERVICE

1. The authority citation for Part 22 is revised to read as follows:

Authority: 47 U.S.C. 154, 303, and 332, unless otherwise noted.

§ 22.105 [Amended]

2. In § 22.105, Table B-1 is amended by removing the number 401 in the ''Form Number'' column and, in its place, adding the number 600 in the ''Form Number''.

3. The following sections of Part 22 are amended by removing the term ''FCC Form 401'' and adding, in its place, the term ''FCC Form 600'':

(a) 22.115(a)(2);
(b) 22.137(c)(1)(ii);
(c) 22.142(c), introductory text, and (d) introductory text;
(d) 22.357, introductory text;
(e) 22.411(d)(1);

(f) 22.413(b)(1);
(g) 22.415(b)(1);
(h) 22.417(b)(1);
(i) 22.507;
(j) 22.529(a), introductory text and (b) introductory text;
(k) 22.531(c);
(l) 22.709(b), introductory text;
(m) 22.803(a), introductory text, and (b) introductory text;
(n) 22.911(b), introductory text;
(o) 22.929(a), introductory text, and (b), introductory text;
(p) 22.941(c);
(q) 22.947(b), introductory text; and
(r) 22.953(a)(2)(iii).

4. Section 22.131 is revised to read as follows:

§ 22.131 Procedures for mutually exclusive applications.

Two or more pending applications are mutually exclusive if the grant of one application would effectively preclude the grant of one or more of the others under Commission rules governing the Public Mobile Services involved. The Commission uses the general procedures in this section for processing mutually exclusive applications in the Public Mobile Services. Additional specific procedures are prescribed in the subparts of this part governing the individual Public Mobile Services (see §§ 22.509, 22.717, and 22.949) and in Part 1 of this chapter.

(a) *Separate applications*. Any applicant that files an application knowing that it will be mutually exclusive with one or more applications should not include in the mutually exclusive application a request for other channels or facilities that would not, by themselves, render the application mutually exclusive with those other applications. Instead, the request for such other channels or facilities should be filed in a separate application.

(b) *Filing groups*. Pending mutually exclusive applications are processed in filing groups. Mutually exclusive applications in a filing group are given concurrent consideration. The Commission may dismiss as defective (pursuant to § 22.128) any mutually exclusive application(s) whose filing date is outside of the date range for inclusion in the filing group. The types of filing groups used in day-to-day application processing are specified in paragraph (c)(3) of this section. A filing group is one of

the following types:

(1) *Renewal filing group*. A renewal filing group comprises a timely-filed application for renewal of an authorization and all timely-filed mutually exclusive competing applications (see § 22.145).

(2) *Same-day filing group*. A same-day filing group comprises all mutually exclusive applications whose filing date is the same day, which is normally the filing date of the first-filed application(s).

(3) *Thirty-day notice and cut-off filing group*. A 30-day notice and cut-off filing group comprises mutually exclusive applications whose filing date is no later than thirty (30) days after the date of the Public Notice listing the first-filed application(s) (according to the filing dates) as acceptable for filing.

(4) *Window filing group*. A window filing group comprises mutually exclusive applications whose filing date is within an announced filing window. An announced filing window is a period of time between and including two specific dates, which are the first and last dates on which applications (or amendments) for a particular purpose may be accepted for filing. In the case of a one-day filing window, the two dates are the same. The dates are made known to the public in advance.

(c) *Procedures*. Generally, the Commission may grant one application in a filing group of mutually exclusive applications and dismiss the other application(s) in the filing group that are excluded by that grant, pursuant to § 22.128.

(1) *Selection methods*. In selecting the application to grant, the Commission may use competitive bidding, random selection, or comparative hearings, depending upon the type of applications involved.

(2) *Dismissal of applications*. The Commission may dismiss any application in a filing group that is defective or otherwise subject to dismissal under § 22.128, either before or after employing selection procedures.

(3) *Type of filing group used*. Except as otherwise provided in this part, the type of filing group used in the processing of two or more mutually exclusive applications depends upon the purpose(s) of the applications.

(i) If one of the mutually exclusive applications is a timely-filed application for

renewal of an authorization, a renewal filing group is used.

(ii) If any mutually exclusive application filed on the earliest filing date is an application for modification and none of the mutually exclusive applications is a timely-filed application for renewal, a same-day filing group is used.

(iii) If all of the mutually exclusive applications filed on the earliest filing date are applications for initial authorization, a 30-day notice and cut-off filing group is used, except that, for Phase I unserved area applications in the Cellular Radiotelephone Service, a one-day window filing group is used (see § 22.949).

(4) *Disposition.* If there is only one application in any type of filing group, the Commission may grant that application and dismiss without prejudice any mutually exclusive applications not in the filing group. If there is more than one mutually exclusive application in a filing group, the Commission disposes of these applications as follows:

(i) *Applications in a renewal filing group.* All mutually exclusive applications in a renewal filing group are designated for comparative consideration in a hearing.

(ii) *Applications in a 30-day notice and cut-off filing group.*

(A) If all of the mutually exclusive applications in a 30-day notice and cut-off filing group are applications for initial authorization, and none is an application for facilities in the Rural Radiotelephone Service, the Commission shall administer competitive bidding procedures in accordance with Subpart Q of Part 1 of this chapter. After such procedures, the application of the successful bidder may be granted and the other applications may be dismissed without prejudice.

(B) If any of the mutually exclusive applications in a 30-day notice and cut-off filing group is an application for modification or an application for facilities in the Rural Radiotelephone Service, the Commission may attempt to resolve the mutual exclusivity by facilitating a settlement between the applicants. If a settlement is not reached within a reasonable time, the Commission may designate all applications in the filing group for comparative consideration in a hearing. In this event, the result of the hearing disposes of all of the applications in the filing group.

(iii) *Applications in a same-day filing group.* If there are two or more mutually exclusive applications in a same-day filing group, the Commission may attempt to

resolve the mutual exclusivity by facilitating a settlement between the applicants. If a settlement is not reached within a reasonable time, the Commission may designate all applications in the filing group for comparative consideration in a hearing. In this event, the result of the hearing disposes of all of the applications in the filing group.

(iv) *Applications in a window filing group*. Applications in a window filing group are processed in accordance with the procedures for a 30-day notice and cut-off filing group in paragraph (c)(4)(ii) of this section.

(d) *Terminology*. For the purposes of this section, terms have the following meanings:

(1) The ''filing date'' of an application is the date on which that application was received in a condition acceptable for filing or the date on which the most recently filed major amendment to that application was received, whichever is later, excluding major amendments in the following circumstances:

(i) The major amendment reflects only a change in ownership or control found by the Commission to be in the public interest;

(ii) The major amendment as received is defective or otherwise found unacceptable for filing; or

(iii) The application being amended has been designated for hearing and the Commission or the presiding officer accepts the major amendment.

(2) An ''application for initial authorization'' is:

(i) Any application requesting an authorization for a new system or station;

(ii) Any application requesting authorization for an existing station to operate on an additional channel, unless the additional channel is for paired two-way radiotelephone operation, is in the same frequency range as the existing channel(s), and will be operationally integrated with the existing channel(s) such as by trunking;

(iii) Any application requesting authorization for a new transmitter at a location more than 2 kilometers (1.2 miles) from any existing transmitters of the applicant licensee on the requested channel or channel block; or

(iv) Any application to expand the CGSA of a cellular system (as defined in § 22.911), except during the five-year build-out period.

(3) An ''application for modification'' is any application other than an application for initial authorization or renewal.

5. Section 22.301 is revised to read as follows:

§ 22.301 Station inspection.

Upon reasonable request, the licensee of any station authorized in the Public Mobile Services must make the station and station records available for inspection by authorized representatives of the Commission at any reasonable hour.

6. Section 22.313 is amended by revising paragraph (a)(4), adding a new paragraph (a)(5), and revising paragraphs (b) and (c) to read as follows:

§ 22.313 Station identification.

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(a) ***

(4) Rural subscriber stations using Basic Exchange Telephone Radio Systems in the Rural Radiotelephone Service; or

(5) Nationwide network paging stations operating on 931 MHz channels.

(b) For all other stations in the Public Mobile Services, station identification must be transmitted each hour within five minutes of the hour, or upon completion of the first transmission after the hour. Transmission of station identification may be temporarily delayed to avoid interrupting the continuity of any public communication in progress, provided that station identification is transmitted at the conclusion of that public communication.

(c) Station identification must be transmitted by telephony using the English language or by telegraphy using the international Morse code, and in a form that can be received using equipment appropriate for the modulation type employed, and understood without the use of unscrambling devices, except that, alternatively, station

identification may be transmitted digitally, provided that the licensee provides the Commission with information sufficient to decode the digital transmission to ascertain the call sign. Station identification comprises transmission of the call sign assigned by the Commission to the station, however, the following may be used in lieu of the call sign:

(1) For transmissions from subscriber operated transmitters, the telephone number or other designation assigned by the carrier, provided that a written record of such designations is maintained by the carrier;

(2) For general aviation airborne mobile stations in the Air-Ground Radiotelephone Service, the official FAA registration number of the aircraft;

(3) For stations in the Paging and Radiotelephone Service, a call sign assigned to another station within the same system.

7. Section 22.357 is revised to read as follows:

§ 22.357 Emission types.

Any authorized station in the Public Mobile Services may transmit any emission type provided that the resulting emission complies with the appropriate emission mask. See §§ 22.359 and 22.917.

8. A new Section 22.509 is added to read as follows:

§ 22.509 Procedures for mutually exclusive applications in the Paging and Radiotelephone Service.

Mutually exclusive applications in the Paging and Radiotelephone Service, including those that are mutually exclusive with applications in the Rural Radiotelephone Service, are processed in accordance with § 22.131 and with this section.

(a) Applications in the Paging and Radiotelephone Service may be mutually exclusive with applications in the Rural Radiotelephone Service if they seek authorization to operate facilities on the same channel in the same area, or the technical proposals are otherwise in conflict. See § 22.567.

(b) A modification application in either service filed on the earliest filing date may

cause all later-filed mutually exclusive applications of any type in either service to be "cut off" (excluded from a same-day filing group) and dismissed, pursuant to § 22.131(c)(3)(ii) and § 22.131(c)(4).

(c) Competitive bidding will not be used as a selection procedure for any filing group that contains one or more applications for facilities in the Rural Radio Service. If a settlement between the applicants cannot be reached in a reasonable time, the applications may be designated for comparative consideration in a hearing. See § 22.131(c)(4)(ii).

9. Section 22.541 is removed.

10. Section 22.717 is revised to read as follows:

§ 22.717 Procedure for mutually exclusive applications in the Rural Radiotelephone Service.

Mutually exclusive applications in the Rural Radiotelephone Service, including those that are mutually exclusive with applications in the Paging and Radiotelephone Service, are processed in accordance with § 22.131 and with this section.

(a) Applications in the Rural Radiotelephone Service may be mutually exclusive with applications in the Paging and Radiotelephone Service if they seek authorization to operate facilities on the same channel in the same area, or the technical proposals are otherwise in conflict. See § 22.567.

(b) A modification application in either service filed on the earliest filing date may cause all later-filed mutually exclusive applications of any type in either service to be "cut off" (excluded from a same-day filing group) and dismissed, pursuant to § 22.131(c)(3)(ii) and § 22.131(c)(4).

(c) Competitive bidding will not be used as a selection procedure for any filing group that contains one or more applications for facilities in the Rural Radio Service. If a settlement between the applicants cannot be reached in a reasonable time, the applications may be designated for comparative consideration in a hearing. See § 22.131(c)(4)(ii).

11. Section 22.949 is amended by revising paragraph (a)(2), adding a NOTE following paragraph (a)(2), revising the introductory text of paragraph (b), and

revising paragraphs (b)(2), (c), (d)(1) and (d)(3), to read as follows:

§ 22.949 Unserved area licensing process.

*****

(a) ***

(2) Only one Phase I initial application is granted on each channel block in each market. Consequently, whenever two or more acceptable Phase I initial applications are timely filed in the same market on the same channel block, such Phase I initial applications are mutually exclusive, regardless of any other considerations such as the technical proposals. In order to determine which of such mutually exclusive Phase I initial applications to grant, the Commission administers competitive bidding procedures in accordance with Subpart Q of Part 1 of this chapter. After such procedures, the application of the winning bidder may be granted and the applications excluded by that grant may be dismissed without prejudice.

NOTE: Notwithstanding the provisions of § 22.949(a)(2), mutually exclusive Phase I initial applications that were filed between March 10, 1993 and July 25, 1993, inclusive, are to be included in a random selection process, following which the selected application may be granted and the applications excluded by that grant may be dismissed without prejudice.

*****

(b) *Phase II.* Phase II is an on-going filing process that allows eligible parties to apply for any unserved areas that may remain in a market after the Phase I process is complete.

*****

(2) There is no limit to the number of Phase II applications that may be granted on each channel block in each market. Consequently, Phase II applications are mutually exclusive only if the proposed CGSAs would overlap. Mutually exclusive applications are processed using the general procedures in § 22.131.

*****

(c) *Settlements among mutually exclusive applicants*. Settlements among some, but not all, applicants with mutually exclusive applications for unserved areas (partial settlements) are prohibited. Settlements among all applicants with mutually exclusive applications (full settlements) are allowed and must be filed no later than fifteen (15) business days before the competitive bidding procedure is scheduled to take place.

(d) ***

(1) The Commission will not accept amendments (of any type) to mutually exclusive Phase I applications prior to the conclusion of the competitive bidding process.

*****

(3) Minor amendments required by § 1.65 of this chapter must be filed no later than thirty (30) days after public notice announcing the results of the competitive bidding process.

Part 24 - PERSONAL COMMUNICATIONS SERVICES

1. The authority citation for Part 24 continues to read as follows:

AUTHORITY: 47 U.S.C. §§ 154, 301, 302, 303, 309, and 332, unless otherwise noted.

2. The following sections of Part 24 are amended by removing the term "FCC Form 401" and adding, in its place, the term "FCC Form 600":

(a) 24.307;
(b) 24.406(b);
(c) 24.409(b);
(d) 24.413(a), introductory text;
(e) 24.426(a);
(f) 24.427(b);
(g) 24.707;
(h) 24.806(b);
(i) 24.809(b);
(j) 24.813(a), introductory text;
(k) 24.826(a); and

(l) 24.827(b).

Part 90 - PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

AUTHORITY: Sections 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. Section 90.5 is amended by redesignating paragraphs (h) through (k) as paragraphs (i) through (l) and adding a new paragraph (h) to read as follows:

§ 90.5 Other applicable rule parts.

*****

(h) Part 20 of this chapter contains rules relating to commercial mobile radio services.

*****

3. Section 90.75 is amended by revising paragraph (a), introductory text, and the third sentence of paragraph (c)(10) to read as follows:

§ 90.75 Business Radio Service.

(a) *Eligibility*. Persons primarily engaged in any of the following activities are eligible to hold authorizations in the Business Radio Service to provide commercial mobile radio service as defined in Part 20 of this chapter or to operate stations for transmission of communications necessary to such activities of the licensee:

*****

(c) * * *

(10) * * * Licensees may provide one-way paging communications on this frequency to individuals, persons eligible for licensing under subpart B, C, D, or E of this part, to representatives of Federal Government agencies, and foreign governments and their representatives.

*****

4. Section 90.115 is revised to read as follows:

§ 90.115 Foreign government and alien eligibility.

(a) No station authorization in the radio services governed by this part shall be granted to or held by a foreign government or its representative.

(b) No station authorization in the radio services governed by this part shall be granted to or held by any entity providing or seeking to provide commercial mobile radio services (except such entities meeting the requirements of § 20.9(c) of this chapter) if such entity is:

(1) An alien or the representative of any alien;

(2) A corporation organized under the laws of any foreign government;

(3) A corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;

(4) A corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

5. Section 90.119 is revised to read as follows:

§ 90.119 Application forms.

The following application forms shall be used--

(a) Form 600 shall be used to apply:

(1) For new base, fixed, or mobile station authorizations governed by this part.

(2) For system authorizations, where the system meets the requirements of § 90.117.

(i) Application for a radio system may be submitted on a single Form 600.

(ii) If the control station(s) will operate on the same frequency as the mobile station, and if the height of the control station(s) antenna(s) will not exceed 6.1 meters (20 feet) above ground or an existing man-made structure (other than an antenna structure), there is no limit on the number of such stations which may be authorized. Appropriate items on Form 600 shall be completed showing the frequency, the station class, the total number of control stations, the emission, and the output power of the highest powered control station. Applicants for all control stations in the 470-512 MHz band must furnish the information requested in the relevant items in Form 600.

(3) For modification or for modification and renewal of an existing authorization. See § 90.135.

(4) For the Commission's consent to the assignment of an authorization to another person or entity, except for authorization to provide commercial mobile radio service. In addition, the application shall be accompanied by a letter from the assignor setting forth his or her desire to assign all right, title, and interest in and to such authorization, stating the call sign and location of the station, and stating that the assignor will submit his or her current station authorization for cancellation upon completion of the assignment. Form 1046 may be used in lieu of this letter.

(5) For reinstatement of an expired license. See also paragraphs (b)(1) and (e) of this section.

(b) Form 405-A shall be used to:

(1) Apply for license reinstatement or renewal if the reinstatement or renewal does not involve the modification of the station or system license.

(2) Notify the Commission of a change in the licensee's name or mailing address that occurs during the license term. See § 90.135(b).

(3) Notify the Commission that the licensee has discontinued station operation and wishes to cancel the license. See § 90.157.

(c) Form 490 shall be used whenever it is proposed that a licensee for a commercial mobile radio service in this Part change, as by transfer of stock ownership, the control of a corporate licensee or for the Commission's consent to an assignment of an authorization to another person or entity.

(d) Form 572, Temporary Permit to Operate a Part 90 Radio Station, should be properly executed if the applicant is eligible and desires to operate his or her station pending the processing of his or her formal application. See also §§ 90.159, and 90.657.

(e) Form 574-R shall be used to apply for renewal of an existing authorization and may be used to apply for reinstatement of an expired license, if the renewal or reinstatement does not involve the modification of the station or system license. (Form 574-R is generated by the Commission and mailed to the licensee prior to the expiration of the license term.)

6. Section 90.131 is amended by adding introductory text before paragraph (a) to read as follows:

§ 90.131 Amendment or dismissal of applications.

This rule governs all applications relating to radio services in this part, including applications filed by entities meeting the requirements of § 20.9(c) of this chapter, except applications concerning facilities used to provide commercial mobile radio services, which are governed by § 90.161.

*****

7. Section 90.135 is amended by revising paragraph (c) to read as follows:

§ 90.135 Modification of license.

*****

(c) Unless specifically exempted in § 90.175, requests for modifications listed in paragraph (a) of this section must be submitted on Form 600 to the applicable frequency coordinator.

*****

8. Section 90.145 is amended by revising the first sentence of paragraph (c) and adding paragraphs (d) and (e) to read as follows:

§ 90.145 Special temporary authority.

*****

(c) Requests for special temporary authority to operate as a private mobile radio service provider for periods exceeding 180 days require evidence of frequency coordination. ***

(d) A request for special temporary authority to operate a commercial mobile radio facility under this part may be granted without being listed in a Public Notice, or prior to thirty (30) days after such listing, if:

(1) The STA is to be valid for thirty (30) days or less and the applicant does not plan to file an application for regular authorization of the subject operation;

(2) The STA is to be valid for sixty (60) days or less, pending the filing of an application for regular authorization of the subject operation;

(3) The STA is to allow interim operation to facilitate completion of authorized construction or to provide substantially the same service as previously authorized; or

(4) The STA is made upon a finding that there are extraordinary circumstances requiring operation in the public interest and that delay in the institution of such service would seriously prejudice the public interest.

(e) The Commission may grant STAs to operate a commercial mobile radio facility for a period not to exceed one hundred eighty (180) days under the provisions of Section 309(f) of the Communications Act of 1934, as amended, 47 U.S.C. 309(f), if extraordinary circumstances so require, and pending the filing of an application for regular operation. The Commission may grant extensions for an additional period of up to one hundred eighty (180) days, but the applicant must show that extraordinary circumstances warrant such an extension.

9. Section 90.149 is amended by revising paragraph (a) to read as follows:

§ 90.149 License term.

(a) Licenses for stations authorized under this part will be issued for a term not to exceed five (5) years from the date of the original issuance, modification, or renewal, except that the license term for stations licensed as commercial mobile radio service on 220-222 MHz, 929-930 MHz paging, Business Radio, and SMR frequencies shall be ten (10) years. Licensees shall have an additional thirty (30) days after the expiration of the license term to apply for reinstatement of expired licenses.

*****

10. Section 90.153 is amended by adding a last sentence to the existing paragraph, and adding paragraphs (a), (b), (c) and (d) to read as follows:

§ 90.153 Transfer or assignment of station authorization.

* * * The assignee is responsible for ascertaining that the station facilities are and will remain in compliance with the terms and conditions of the authorization to be assigned.

(a) *Application required.* The assignor or transferor of a commercial mobile radio license under this part must file an application for approval of assignment or transfer of control (Commission Form 490). In the case of involuntary assignment, such application must be filed no later than thirty (30) days after the event causing the assignment. The assignee or transferee must file a report qualifying it as a commercial mobile radio provider (Commission Form 430) unless a current report is already on file with the Commission.

(b) Notification of completion. Assignments and transfers of control of commercial mobile radio licenses must be completed within sixty (60) days of Commission approval. The assignee or transferee must notify the Commission by letter of the date of completion of the assignment or transfer of control. If an assignment or transfer of control is not completed within this time, the assignor or transferor must so notify the Commission by letter, and the assignee or transferee must submit the authorization(s) to the Commission for cancellation or request an extension of time to complete the assignment or transfer of control. If the assignment or transfer of control is not completed, the authorization(s) remain with the assignor or transferor.

(c) Partial assignment of authorization. If the authorization for some, but not all, of the facilities of a commercial mobile radio station is assigned to another party, voluntarily or involuntarily, such action is a partial assignment of authorization.

(1) To request Commission approval of a partial assignment of authorization, the following must be filed in addition to the forms required by paragraph (a) of this section:

(i) The assignor must notify the Commission (Commission Form 600) of the facilities to be deleted from its authorization upon completion of the assignment.

(ii) The assignee must apply for authority (Commission Form 600) to operate a new station including the facilities for which authorization is assigned, or to modify the assignee's existing station to include the facilities for which authorization was assigned.

(2) Partial assignments must be completed within sixty (60) days of Commission approval. If an approved partial assignment is not completed within this time, the assignor must notify the Commission (Commission Form 600), and the assignee must submit the authorization(s) to the Commission for cancellation or request an extension of time to complete the assignment. If the assignment is not completed, the authorization(s) remain with the assignor.

(d) Limitations. The Commission may deny applications for assignment of authorization or consent to transfer of control of a commercial mobile radio license if:

(1) The Commission is unable to make the public interest determinations required under the Communications Act with respect to both parties to the assignment or transfer; or

(2) The authorization was obtained for the principal purpose of speculation or profitable resale, rather than provision of commercial mobile radio services to the public.

11. Section 90.155 is amended by revising paragraph (a) to read as follows:

§ 90.155 Time in which station must be placed in operation.

(a) All stations authorized under this part, except stations authorized in the 220-222 MHz, 929-930 MHz paging, Business Radio, and SMR services, and except as provided in paragraph (b) of this section and in §§ 90.629 and 90.631(f), must be placed in operation within eight (8) months from the date of grant or the authorization cancels automatically and must be returned to the Commission. For stations authorized

to 220-222 MHz, 929-930 MHz paging, Business Radio, and SMR licensees, see § 90.167.

*****

12. Section 90.159 is amended by revising the first sentence in paragraphs (a), (b), and (c) to read as follows:

§ 90.159 Temporary and conditional permits.

(a) An applicant for a license under this part (other than a commercial mobile radio license) utilizing an already licensed facility may operate the radio station(s) for a period of up to one hundred eighty (180) days under a temporary permit evidenced by a properly executed temporary license certificate (Form 572) after submitting or filing a formal application for station license in accordance with § 90.127, provided that all the antennas employed by control stations are 6.1 meters (20 feet) or less above ground or 6.1 meters (20 feet) or less above a man-made structure other than an antenna tower to which it is affixed. * * *

(b) An applicant proposing to operate a new land mobile station or modify an existing station below 470 MHz or in the one-way paging 929-930 MHz band (other than a commercial mobile radio service applicant or licensee on these bands) that is required to submit a frequency recommendation pursuant to paragraphs (a) through (e) of § 90.175 may operate the proposed station during the pendency of its application for a period of up to one hundred eighty (180) days under a conditional permit upon the filing of a properly completed formal application that complies with § 90.127 if the application is accompanied by evidence of frequency coordination in accordance with §§ 90.175 and 90.176, and provided that the following conditions are satisfied: * * *

(c) An applicant proposing to operate an itinerant station or an applicant seeking the assignment of authorization or transfer of control of a license for an existing station below 470 MHz or in the 929-930 MHz band (other than a commercial mobile radio service applicant or licensee on these bands) may operate the proposed station during the pendency of the application for a period not to exceed one hundred eighty (180) days under a conditional permit upon the filing of a properly completed formal application that complies with § 90.127. * * *

*****

13. Part 90 is amended by adding a center heading and a note after § 90.159 to read as follows:

SPECIAL RULES GOVERNING
FACILITIES USED TO PROVIDE
COMMERCIAL MOBILE RADIO SERVICES

NOTE: The following rules (§ 90.160 through § 90.169) govern applications, licensing, and operation of radio facilities in the 220-222 MHz (Subpart T), Business Radio (Subpart D), 929-930 MHz Paging (Subpart P), and Specialized Mobile Radio (Subpart S) services that are used to provide commercial mobile radio services (see §§ 20.3 and 20.9 of this chapter). Compliance with the rules relating to applications and licensing of facilities on paging-only channels in the Business Radio Service (see § 90.75(c)(10)) and 929-930 MHz paging channels (see § 90.494(a),(b)) is not required prior to August 10, 1996. Compliance with Section 90.168 is also not required prior to August 10, 1996 for reclassified commercial mobile radio service providers who are to be regulated as private carriers until August 10, 1996 as provided in the Second Report and Order in GN Docket No. 93-252, 9 FCC Rcd 2348 (1994), paras. 280-284. The licensing and operation of radio facilities in the 220-222 MHz (Subpart T), Business Radio (Subpart D), 929-930 MHz Paging (Subpart P), and Specialized Mobile Radio (Subpart S) services that are used to provide commercial mobile radio services are also subject to rules elsewhere in this part that apply generally to Private Land Mobile Radio Services. In the case of any conflict between rules set forth in §§ 90.160 through 90.169 and other rules in this part, §§ 90.160 through 90.169 apply.

14-23. New §§ 90.160 through 90. 169 are added to subpart G to read as follows:

§ 90.160 Public Notice

Periodically, the Commission will issue Public Notices listing major filings and other information of public significance concerning commercial mobile radio services licensed under this part. Categories of Public Notice listings are as follows:

(a) *Accepted for filing.* Acceptance for filing of all applications and major amendments thereto.

(b) *Actions.* Commission actions on pending applications previously listed as accepted for filing.

(c) *Informative listings*. Information that the Commission, in its discretion, believes to be of public significance. Such listings do not create any rights to file oppositions or other pleadings.

§ 90.161 Amendment or dismissal of applications

(a) *Amendment.* Pending applications concerning facilities for providing commercial mobile radio services may be amended as a matter of right if such applications have not been designated for hearing or listed in a Public Notice for a random selection or competitive bidding process, except as provided in paragraphs (a)(1) and (a)(2) of this section. If a petition to deny or other formal objection has been filed, a copy of any amendment (or other filing) must be served on the petitioner. If the Commission has issued a Public Notice stating that the application appears to be mutually exclusive with another application (or applications), a copy of any amendment (or other filing) must be served on any such mutually exclusive applicant (or applicants).

(1) Amendments to applications that resolve mutual exclusivity may be filed at any time, subject to the requirements of § 90.162.

(2) Amendments to applications designated for hearing may be allowed by the presiding officer and amendments to applications selected in a random selection process may be allowed by the Commission for good cause shown. In such instances, a written petition demonstrating good cause must be submitted and served upon the parties of record.

(b) *Dismissal.* The Commission may dismiss any application for authorization, assignment of authorization, or consent to transfer of control of a commercial mobile radio facility

(1) Upon request by the applicant; Any applicant may request that its application be returned or dismissed. A request for the return of an application after it has been listed on Public Notice as tentatively accepted for filing is considered to be a request for dismissal of that application without prejudice.

(i) If the applicant requests dismissal of its application with prejudice, the Commission will dismiss the application with prejudice.

(ii) If the applicant requests dismissal of its application without prejudice, the Commission will dismiss that application without prejudice, unless

(A) the application has been designated for comparative hearing;

(B) it has been selected in a random selection process; or

(C) it is an application for which the applicant submitted the winning bid in a competitive bidding process. If the applicant requests dismissal of its application for which it submitted the winning bid in a competitive bidding process, the Commission will dismiss that application with prejudice. If the applicant requests dismissal of its application after that application has been designated for comparative hearing or selected in a random selection process, it may submit a written petition requesting that the dismissal be without prejudice. Such petition must demonstrate good cause, comply with § 90.162 of this part, and be served upon all parties of record. The Commission may grant such petition and dismiss the application without prejudice or deny the petition and dismiss the application with prejudice.

(2) If the application is untimely filed; The Commission may dismiss without prejudice any application that is prematurely or late filed, including any application filed prior to the opening date or after the closing date of a filing window, or after the cut-off date for a mutually exclusive application filing group.

(3) If the application is mutually exclusive with another application that is selected or granted in accordance with the rules in this part; The Commission may dismiss any mutually exclusive application:

(i) For which the applicant did not submit the winning bid in a competitive bidding process;

(ii) That is included in a random selection process but is not granted; or

(iii) That receives comparative consideration in a hearing but is not granted by order of the presiding officer.

(4) For failure to prosecute; The Commission may dismiss applications for failure of the applicant to prosecute or for failure of the applicant to respond substantially within a specified time period to official correspondence or requests for additional information. Such dismissal will generally be without prejudice if the failure to prosecute or respond occurred prior to designation of the application for comparative hearing or prior to selection of the application in a random selection process, but may be with prejudice in cases of non-compliance with § 90.162. Dismissal will generally

be with prejudice if the failure to prosecute or respond occurred after designation of the application for comparative hearing or after selection of the application in a random selection process. The Commission may dismiss applications with prejudice for failure of the applicant to comply with requirements related to a competitive bidding process.

(5) If the requested spectrum is not available; The Commission may dismiss any application that requests spectrum which is unavailable because:

(i) It was previously assigned to another licensee on an exclusive basis or cannot be assigned to the applicant without causing interference; or

(ii) Reasonable efforts have been made to coordinate the proposed facility with foreign administrations under applicable international agreements, and an unfavorable response (harmful interference anticipated) has been received.

(6) If the application is found to be defective. Such dismissal may be ''without prejudice,'' meaning that the Commission may accept from the applicant another application for the same purpose at any later time, or ''with prejudice,'' meaning that the Commission will not accept from the applicant another application for the same purpose for a period of one year following the date of the dismissal action taken by the Commission. Unless otherwise provided in this part, a dismissed application will not be returned to the applicant.The Commission may dismiss without prejudice applications that it finds to be defective. An application for authorization or assignment of authorization is defective if:

(i) It is unsigned or incomplete with respect to required answers to questions, informational showings, or other matters of a formal character; or

(ii) It requests an authorization that would not comply with the Commission's Rules and does not contain a request for waiver of these rule(s), or in the event that the Commission denies such a waiver request, does not contain an alternative proposal that fully complies with the rules.

§ 90.162 Agreements to dismiss applications, amendments, or pleadings

(a) Parties that have filed an application concerning facilities used to provide commercial mobile radio services that is mutually exclusive with one or more other applications, and then enter into an agreement to resolve the mutual exclusivity by withdrawing or requesting dismissal of the application or an amendment thereto, must obtain the approval of the Commission. Parties that have filed or threatened to file a petition to deny, informal objection, or other pleading against a pending application, and then seek to withdraw or request dismissal of, or refrain from filing, the petition, either unilaterally or in exchange for a financial consideration, must obtain the approval of the Commission.

(b) The party withdrawing or requesting dismissal of its application, petition to deny, informal objection, or other pleading, or refraining from filing a pleading, must submit to the Commission a request for approval of the withdrawal or dismissal, a copy of any written agreement related to the withdrawal or dismissal, and an affidavit setting forth:

(1) A certification that neither the party nor its principals has received or will receive any money or other consideration in excess of the legitimate and prudent expenses incurred in preparing and prosecuting the application, petition to deny, informal objection, or other pleading in exchange for the withdrawal or dismissal of the application, petition to deny, informal objection, or other pleading, or threat to file a pleading, except that this provision does not apply to dismissal or withdrawal of applications pursuant to bona fide merger agreements;

(2) The exact nature and amount of any consideration received or promised;

(3) An itemized accounting of the expenses for which it seeks reimbursement; and

(4) The terms of any oral agreement related to the withdrawal or dismissal of the application, petition to deny, informal objection, or other pleading or threat to file a pleading.

(c) In addition, within five (5) days of the filing date of the applicant's or petitioner's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth:

(1) A certification that neither the applicant nor its principals has paid or will pay money or other consideration in excess of the legitimate and prudent expenses of the petitioner in exchange for withdrawing or dismissing the application, petition to deny,

informal objection, or other pleading; and

(2) The terms of any oral agreement relating to the withdrawal or dismissal of the application, petition to deny, informal objection, or other pleading.

(d) No person shall make or receive any payments in exchange for withdrawing a threat to file or refraining from filing a petition against an application. For purposes of this section, reimbursement by an applicant of the legitimate and prudent expenses of a potential petitioner or objector, incurred reasonably and directly in preparing to file a petition to deny, will not be considered to be payment for refraining from filing a petition to deny or an informal objection. Payments made directly to a potential petitioner or objector, or a person related to a potential petitioner or objector, to implement non-financial promises are prohibited unless specifically approved by the Commission.

(e) For the purposes of this section:

(1) Affidavits filed pursuant to this section must be executed by the filing party, if an individual, a partner having personal knowledge of the facts, if a partnership, or an officer having personal knowledge of the facts, if a corporation or association.

(2) Applications, petitions to deny, informal objections, and other pleadings are deemed to be pending before the Commission from the time the application or petition to deny is filed with the Commission until such time as an order of the Commission granting, denying, or dismissing the application, petition to deny, informal objection, or other pleading is no longer subject to reconsideration by the Commission or to review by any court.

(3) ''Legitimate and prudent expenses'' are those expenses reasonably incurred by a party in preparing to file, filing, prosecuting and/or settling its application, petition to deny, informal objection, or other pleading for which reimbursement is sought.

(4) ''Other consideration'' consists of financial concessions, including, but not limited to, the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

§ 90.163 Petitions to deny, responsive pleadings.

Petitions to deny any major filing concerning facilities used to provide commercial mobile radio services may be filed by parties able to demonstrate standing to file such petitions. Responsive pleadings to such petitions may be filed in accordance with the provisions of this section.

(a) *Content and requirements.* Petitions to deny and responsive pleadings must:

(1) Clearly identify the pertinent major filing(s);

(2) Comply with all applicable requirements of §§ 1.41 through 1.52 of this chapter;

(3) Contain specific allegations of fact which, except for facts of which official notice may be taken, are supported by affidavit of a person or persons with personal knowledge thereof, and which are sufficient to demonstrate that the petitioner (or respondent) is a party in interest and that a grant or other Commission action regarding the major filing would be inconsistent with the public interest;

(4) Be filed within 30 days after the date of the Public Notice listing the major filing; and

(5) Contain a certificate of service showing that a copy has been mailed to the applicant no later than the date of filing with the Commission.

(b) *Expansion.* Petitions to deny a major amendment to an application may raise only matters directly related to the major amendment that could not have been raised in connection with the application as originally filed. This paragraph does not apply to petitioners who gain standing because of the major amendment.

(c) *Dismissal.* The Commission may, by letter, dismiss any petition to deny a major filing if the petition does not comply with the requirements of this section or § 90.161. The reason(s) for the dismissal must be stated in the letter. When a petition to deny is dismissed, any related responsive pleadings also are dismissed.

§ 90.164 Classification of filings as major or minor.

Applications and amendments to applications are classified as major or minor when

such filings concern facilities used to provide commercial mobile radio services. Categories of major and minor filings are listed in § 309 of the Communications Act of 1934, as amended (47 U.S.C. § 309). In general, a major filing is a request for a Commission action that has the potential to affect parties other than the applicant. The following are major filings:

(a) *Initial Station Authorization.* Filings for an initial authorization as defined in § 90.165(d)(2) are major.

(b) *Ownership or control change.* Filings are major if they specify a substantial change in beneficial ownership or control (de jure or de facto), unless such change is involuntary or if the filing merely amends an application to reflect a change in ownership or control that has already been approved by the Commission.

(c) *Renewal.* Applications for renewal of authorizations are major.

(d) *Environmental.* Filings are major if they request authorization for a facility that would have a significant environmental effect, as defined by §§ 1.1301 through 1.1319 of this chapter.

(e) In the Specialized Mobile Radio Service, in addition to filings listed in paragraphs (a) through (d) of this section, filings are major if they:

(1) Request a change in frequency;

(2) Request an authorization that would increase the effective radiated power or antenna height above average terrain in any azimuth from an existing transmitter authorized to the filer;

(3) Request an authorization that would relocate an existing fixed transmitter;

(4) Amend a pending application to change a requested frequency;

(5) Amend a pending application in a way that would increase the proposed effective radiated power or antenna height above average terrain in any azimuth from an existing transmitter authorized to the filer;

(6) Amend a pending application to change the location of a fixed transmitter from that previously proposed in the application; or

(7) Amend a pending application for which pre-filing coordination was required to change the technical proposal substantially from that which was coordinated with other users.

§ 90.165 Procedures for mutually exclusive applications.

Mutually exclusive commercial mobile radio service applications are processed in accordance with the rules in this section, except for mutually exclusive applications for licenses in the 220-220 MHz service and the 929-930 MHz Paging service, which are processed in accordance with the rules in subpart T and subpart P of this part.

Two or more pending applications are mutually exclusive if the grant of one application would effectively preclude the grant of one or more of the others under Commission rules governing the services involved.

(a) *Separate applications.* Any applicant that files an application knowing that it will be mutually exclusive with one or more applications should not include in the mutually exclusive application a request for other channels or facilities that would not, by themselves, render the application mutually exclusive with those other applications. Instead, the request for such other channels or facilities should be filed in a separate application.

(b) *Filing groups.* Pending mutually exclusive applications are processed in filing groups. Mutually exclusive applications in a filing group are given concurrent consideration. The Commission may dismiss as defective (pursuant to § 90.162) any mutually exclusive application(s) whose filing date is outside of the date range for inclusion in the filing group. The types of filing groups used in day-to-day application processing are specified in paragraph (c)(3) of this section. A filing group is one of the following types:

(1) *Renewal filing group.* A renewal filing group comprises a timely-filed application for renewal of an authorization and all timely-filed mutually exclusive competing applications.

(2) *Same-day filing group.* A same-day filing group comprises all mutually exclusive applications whose filing date is the same day, which is normally the filing date of the first-filed application(s).

(3) *Thirty-day notice and cut-off filing group.* A 30-day notice and cut-off filing

group comprises mutually exclusive applications whose filing date is no later than thirty (30) days after the date of the Public Notice listing the first-filed application(s) (according to the filing dates) as acceptable for filing.

(4) *Window filing group.* A window filing group comprises mutually exclusive applications whose filing date is within an announced filing window. An announced filing window is a period of time between and including two specific dates, which are the first and last dates on which applications (or amendments) for a particular purpose may be accepted for filing. In the case of a one-day filing window, the two dates are the same. The dates are made known to the public in advance.

(c) *Procedures.* Generally, the Commission may grant one application in a filing group of mutually exclusive applications and dismiss the other application(s) in the filing group that are excluded by that grant, pursuant to § 90.162.

(1) *Selection methods.* In selecting the application to grant, the Commission may use competitive bidding, random selection, or comparative hearings, depending on the type of applications involved.

(2) *Dismissal of applications.* The Commission may dismiss any application in a filing group that is defective or otherwise subject to dismissal under § 90.162, either before or after employing selection procedures.

(3) *Type of filing group used.* Except as otherwise provided in this part, the type of filing group used in processing of two or more mutually exclusive applications depends on the purpose(s) of the applications.

(i) If one of the mutually exclusive applications is a timely-filed application for renewal of an authorization, a renewal filing group is used.

(ii) If any mutually exclusive application filed on the earliest filing date is an application for modification and none of the mutually exclusive applications is a timely-filed application for renewal, a same-day filing group is used.

(iii) If all of the mutually exclusive applications filed on the earliest filing date are applications for initial authorization, a 30-day notice and cut-off filing group is used.

(4) *Disposition.* If there is only one application in any type of filing group, the

Commission may grant that application and dismiss without prejudice any mutually exclusive applications not in the filing group. If there is more than one mutually exclusive application in a filing group, the Commission disposes of these applications as follows:

(i) Applications in a renewal filing group. All mutually exclusive applications in a renewal filing group are designated for comparative consideration in a hearing.

(ii) Applications in a 30-day notice and cut-off filing group.

(A) If all of the mutually exclusive applications in a 30-day notice and cut-off filing group are applications for initial authorization, the Commission administers competitive bidding procedures in accordance with subpart Q of part 1 of this chapter. After such procedures, the application of the successful bidder may be granted and the other applications may be dismissed without prejudice.

(B) If any of the mutually exclusive applications in a 30-day notice and cut-off filing group is an application for modification or an application for facilities, the Commission may attempt to resolve the mutual exclusivity by facilitating a settlement between the applicants. If a settlement is not reached within a reasonable time, the Commission may designate all applications in the filing group for comparative consideration in a hearing. In this event, the result of the hearing disposes all of the applications in the filing group.

(iii) Applications in a same-day filing group. If there are two or more mutually exclusive applications in a same-day filing group, the Commission may attempt to resolve the mutual exclusivity by facilitating a settlement between the applicants. If a settlement is not reached within a reasonable time, the Commission may designate all applications in the filing group for comparative consideration in a hearing. In this event, the result of the hearing disposes all of the applications in the filing group.

(iv) Applications in a window filing group. Applications in a window filing group are processed in accordance with the procedures for a 30-day notice and cut-off filing group in paragraph (c)(4)(ii) of this section.

(d) *Terminology.* For the purposes of this section, terms have the following meanings:

(1) The ''filing date'' of an application is the date on which that application was received in a condition acceptable for filing or the date on which the most recently

filed major amendment to that application was received, whichever is later, excluding major amendments in the following circumstances:

(i) The major amendment reflects only a change in ownership or control found by the Commission to be in the public interest;

(ii) The major amendment as received is defective or otherwise found unacceptable for filing; or

(iii) The application being amended has been designated for hearing and the Commission or the presiding officer accepts the major amendment.

(2) An ''application for initial authorization'' is:

(i) Any application requesting an authorization for a new system or station;

(ii) Any application requesting authorization for an existing station to operate on an additional channel, unless the additional channel is for paired two-way radiotelephone operation, is in the same frequency range as the existing channel(s), and will be operationally integrated with the existing channel(s) such as by trunking; or

(iii) any application requesting authorization for a new transmitter at a location more than 2 kilometers (1.2 miles) from any existing transmitters of the applicant licensee on the requested channel or channel block.

(3) An ''application for modification'' is any application other than an application for initial authorization or renewal.

§ 90.166 Grants of applications.

Applications for a commercial mobile radio service authorization under this part may be granted thirty 30 days after the issuance date of a Public Notice listing an application or the latest filed major amendment thereto as acceptable for filing.

(a) *Criteria for grants*. The Commission grants applications without a hearing if, after examination of the application and consideration of any petitions or other pleadings and of such other matters as it may officially notice, the Commission finds that:

(1) A grant will serve the public interest, convenience, and necessity;

(2) There are no substantial and material questions of fact presented;

(3) The applicant is eligible and qualified under applicable Commission regulations and policies;

(4) The application is acceptable for filing, and complies with the Commission rules and other applicable requirements;

(5) The application has not been designated for a hearing after being selected in a random selection process;

(6) There are no applications entitled to comparative consideration with the application being granted; and

(7) Operation of the proposed station would not cause interference to any authorized station(s).

(b) *Grant of petitioned applications*. The Commission may grant, without a formal hearing, applications against which petitions to deny have been filed. If any petition(s) to deny are pending (*i.e.*, have not been dismissed pursuant to § 90.161 or withdrawn by the petitioner) when an application is granted, the Commission shall deny the petition(s) and issue a concise statement of the reason(s) for the denial, disposing of all substantive issues raised in the petitions.

(c) *Partial and conditional grants*. The Commission may grant applications in part, and/or subject to conditions other than those normally applied to authorizations of the same type. When the Commission does this, it will inform the applicant of the reasons therefor. Such partial or conditional grants are final unless the Commission revises its action in response to a petition for reconsideration. Such petitions for reconsideration must be filed by the applicant within thirty days after the date of the letter or order stating the reasons for the partial or conditional grant, and must reject the partial or conditional grant and return the instrument of authorization.

(d) *Designation for hearing*. The Commission may designate applications for a hearing, specifying with particularity the matters in issue, if, after consideration of the application, any petitions or other pleadings, and other matters which it may officially notice, the Commission is unable to make one or more of the findings listed in

paragraph (a) of this section. The Commission may grant, deny, or take other action with respect to applications designated for a hearing.

§ 90.167 Time in which a station must commence service.

(a) Unless otherwise specified in this part, all 220-222 MHz, private carrier paging, Business Radio, and SMR licensees must commence service within twelve (12) months from the date of grant or the authorization cancels automatically and must be returned to the Commission.

(b) For purposes of this section, a station licensed to provide commercial mobile radio service is not considered to have commenced service unless it provides service to at least one unaffiliated party.

(c) Application for extension of time to commence service may be made on Commission Form 600. Extensions of time must be filed prior to the expiration of the construction period. Extensions will be granted only if the licensee shows that the failure to commence service is due to causes beyond his or her control. No extensions will be granted for delays caused by lack of financing, lack of site availability, for the assignment or transfer of control of an authorization, or for failure to timely order equipment. If the licensee orders equipment within 90 days of the license grant, a presumption of due diligence is created.

(d) An application for modification of an authorization (under construction) at the existing location does not extend the initial construction period. If additional time to commence service is required, a request for such additional time must be submitted on Commission Form 600, either separately or in conjunction with the submission of the Commission Form 600 requesting modification.

§ 90.168 Equal employment opportunities.

Commercial Mobile Radio Services licensees shall afford equal opportunity in employment to all qualified persons, and personnel must not be discriminated against in employment because of sex, race, color, religion, or national origin.

(a) *Equal employment opportunity program.* Each licensee shall establish, maintain, and carry out a positive continuing program of specific practices designed to assure equal opportunity in every aspect of employment policy and practice.

(1) Under the terms of its program, each licensee shall:

(i) Define the responsibility of each level of management to insure a positive application and vigorous enforcement of the policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance.

(ii) Inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and enlist their cooperation.

(iii) Communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to sex, race, color, religion or national origin, and solicit their recruitment assistance on a continuing basis.

(iv) Conduct a continuing campaign to exclude every form of prejudice or discrimination based upon sex, race, color, religion, or national origin, from the licensee's personnel policies and practices and working conditions.

(v) Conduct a continuing review of job structure and employment practices and adopt positive recruitment, training, job design and other measures needed in order to insure genuine equality of opportunity to participate fully in all organizational units, occupations and levels of responsibility.

(2) The program must reasonably address specific concerns through policies and actions as set forth in this paragraph, to the extent that they are appropriate in consideration of licensee size, location and other factors.

(i) To assure nondiscrimination in recruiting.

(A) Posting notices in the licensee's offices informing applicants for employment of their equal employment rights and their right to notify the Equal Employment Opportunity Commission (EEOC), the Federal Communications Commission (Commission), or other appropriate agency. Where a substantial number of applicants are Spanish-surnamed Americans, such notice should be posted in both Spanish and English.

(B) Placing a notice in bold type on the employment application informing prospective employees that discrimination because of sex, race, color, religion, or national origin is prohibited, and that they may notify the EEOC, the Commission, or

other appropriate agency if they believe they have been discriminated against.

(C) Placing employment advertisements in media which have significant circulation among minority groups in the recruiting area.

(D) Recruiting through schools and colleges with significant minority group enrollments.

(E) Maintaining systematic contacts with minority and human relations organizations, leaders and spokespersons to encourage referral of qualified minority or female applicants.

(F) Encouraging present employees to refer minority or female applicants.

(G) Making known to the appropriate recruitment sources in the employer's immediate area that qualified minority members are being sought for consideration whenever the licensee hires.

(ii) To assure nondiscrimination in selection and hiring.

(A) Instructing employees of the licensee who make hiring decisions that all applicants for all jobs are to be considered without discrimination.

(B) Where union agreements exist, cooperating with the union or unions in the development of programs to assure qualified minority persons or females of equal opportunity for employment, and including an effective nondiscrimination clause in new or renegotiated union agreements.

(C) Avoiding use of selection techniques or tests that have the effect of discriminating against minority groups or females.

(iii) To assure nondiscriminatory placement and promotion.

(A) Instructing employees of the licensee who make decisions on placement and promotion that minority employees and females are to be considered without discrimination, and that job areas in which there is little or no minority or female representation should be reviewed to determine whether this results from discrimination.

(B) Giving minority groups and female employees equal opportunity for positions which lead to higher positions. Inquiring as to the interest and skills of all lower-paid employees with respect to any of the higher-paid positions, followed by assistance, counseling, and effective measures to enable employees with interest and potential to qualify themselves for such positions.

(C) Reviewing seniority practices to insure that such practices are nondiscriminatory and do not have a discriminatory effect.

(D) Avoiding use of selection techniques or tests that have the effect of discriminating against minority groups or females.

(iv) To assure nondiscrimination in other areas of employment practices.

(A) Examining rates of pay and fringe benefits for present employees with equivalent duties and adjusting any inequities found.

(B) Providing opportunity to perform overtime work on a basis that does not discriminate against qualified minority groups or female employees.

(b) *EEO statement.* Each licensee having sixteen (16) or more full-time employees shall file with the Commission, no later than May 31st following the grant of that licensee's first Commercial Mobile Radio Services authorization, a statement describing fully its current equal employment opportunity program, indicating specific practices to be followed in order to assure equal employment opportunity on the basis of sex, race, color, religion, or national origin in such aspects of employment practices as regards recruitment, selection, training, placement, promotion, pay, working conditions, demotion, layoff, and termination. Any licensee having sixteen (16) or more full-time employees that changes its existing equal employment opportunity program shall file with the Commission, no later than May 31st thereafter, a revised statement reflecting the change(s).

NOTE: Commercial mobile radio service licensees having sixteen (16) or more full-time employees that do not have a current EEO statement on file with the Commission as of January 2, 1995, must file the statement required by this paragraph no later than May 31, 1995.

(c) *Report of complaints filed against licensees.* Each licensee, regardless of how many employees it has, shall submit an annual report to the Commission no later than May

31st of each year indicating whether any complaints regarding violations by the licensee or equal employment provisions of Federal, State, Territorial, or local law have been filed before anybody having competent jurisdiction.

(1) The report should state the parties involved, the date filing, the courts or agencies before which the matters have been heard, the appropriate file number (if any), and the respective disposition or current status of any such complaints.

(2) Any licensee who has filed such information with the EEOC may file a notification of such filing with the Commission in lieu of a report.

(d) *Complaints of violations of Equal Employment Programs.* Complaints alleging employment discrimination against a common carrier licensee are considered by the Commission in the following manner:

(1) If a complaint raising an issue of discrimination is received against a licensee who is within the jurisdiction of the EEOC, it is submitted to that agency. The Commission maintains a liaison with that agency that keeps the Commission informed of the disposition of complaints filed against common carrier licensees.

(2) Complaints alleging employment discrimination against a common carrier licensee who does not fall under the jurisdiction of the EEOC but is covered by appropriate enforceable State law, to which penalties apply, may be submitted by the Commission to the respective State agency.

(3) Complaints alleging employment discrimination against a common carrier licensee who does not fall under the jurisdiction of the EEOC or an appropriate State law, are accorded appropriate treatment by the Commission.

(4) The Commission will consult with the EEOC on all matters relating to the evaluation and determination of compliance by the common carrier licensees with the principles of equal employment as set forth herein.

(5) Complaints indicating a general pattern of disregard of equal employment practices which are received against a licensee that is required to file an employment report to the Commission under § 1.815(a) of this chapter are investigated by the Commission.

(e) *Commission records.* A copy of every annual employment report, equal

employment opportunity program statement, reports on complaints regarding violation of equal employment provisions of Federal, State, Territorial, or local law, and copies of all exhibits, letters, and other documents filed as part thereof, all amendments thereto, all correspondence between the licensee and the Commission pertaining to the reports after they have been filed and all documents incorporated therein by reference, are open for public inspection at the offices of the Commission.

(f) *Licensee records.* Each licensee required to file annual employment reports (pursuant to § 1.815(a) of this chapter), equal employment opportunity program statements, and annual reports on complaints regarding violations of equal employment provisions of Federal, State, Territorial, or local law shall maintain for public inspection a file containing a copy of each such report and copies of all exhibits, letters, and other documents filed as part thereto, all correspondence between the licensee and the Commission pertaining to the reports after they have been filed and all documents incorporated therein by reference. The documents must be retained for a period of two (2) years.

§ 90.169 Construction prior to grant of application.

Applicants may construct facilities prior to grant of their applications, subject to the provisions of this section, but must not operate such facilities until the Commission grants an authorization. If the conditions stated in this section are not met, applicants must not begin to construct facilities.

(a) *When applicants may begin construction.* An applicant may begin construction of a facility thirty-five (35) days after the date of the Public Notice listing the application for that facility as acceptable for filing.

(b) *Notification to stop.* If the Commission for any reason determines that construction should not be started or should be stopped while an application is pending, and so notifies the applicant, orally (followed by written confirmation) or in writing, the applicant must not begin construction or, if construction has begun, must stop construction immediately.

(c) *Assumption of risk.* Applicants that begin construction pursuant to this section before receiving an authorization do so at their own risk and have no recourse against the United States for any losses resulting from:

(1) Applications that are not granted;

(2) Errors or delays in issuing Public Notices;

(3) Having to alter, relocate, or dismantle the facility; or

(4) Incurring whatever costs may be necessary to bring the facility into compliance with applicable laws, or Commission rules and orders.

(d) *Conditions*. Except as indicated, all pre-grant construction is subject to the following conditions:

(1) The application is not mutually exclusive with any other application;

(2) No petitions to deny the application have been filed;

(3) The application does not include a request for a waiver of one or more Commission rules;

(4) For any construction or alteration that would exceed the requirements of § 17.7 of this chapter, the licensee has notified the appropriate Regional Office of the Federal Aviation Administration (FAA Form 7460-1), filed a request for antenna height clearance and obstruction marking and lighting specifications (FCC Form 854) with the Commission;

(5) The applicant has indicated in the application that the proposed facility would not have a significant environmental effect, in accordance with §§ 1.1301 through 1.1319 of this chapter; and,

(6) Under applicable international agreements and rules in this part, individual coordination of the proposed channel assignment(s) with a foreign administration is not required.

24. Section 90.179 is amended by adding a new paragraph (g) to read as follows:

§ 90.179 Shared use of radio stations.

*****

(g) The provisions of this section do not apply to licensees authorized to provide commercial mobile radio service under this part.

25. Section 90.403 is amended by revising paragraph (c) to read as follows:

§ 90.403 General operating requirements.

*****

(c) Except for stations that have been granted exclusive channels under this part and that are classified as commercial mobile radio service providers pursuant to Part 20 of this chapter, each licensee must restrict all transmissions to the minimum practical transmission time and must employ an efficient operating procedure designed to maximize the utilization of the spectrum.

*****

26. Section 90.405 is amended by revising paragraph (b) to read as follows:

§ 90.405 Permissible communications.

*****

(b) The provisions contained in paragraph (a) of this section do not apply where a single base station licensee has been authorized to use a channel above 470 MHz on an exclusive basis, or to stations licensed under this part that are classified as CMRS providers under Part 20 of this chapter.

27. Section 90.415 is amended by revising paragraph (b) to read as follows:

§ 90.415 Prohibited uses.

*****

(b) Render a communications common carrier service, except for stations in the Special Emergency Radio Service providing communications standby facilities under § 90.49, operational fixed stations licensed in the Railroad Radio Service handling public telegraph messages as agents of telegraph common carriers in those instances where such public telegraph service cannot be provided through other railroad facilities, and stations licensed under this part in the SMR, private carrier paging, Business Radio, or 220-222 MHz services.

28. Section 90.425 is amended by adding paragraph (e) to read as follows:

§ 90.425 Station identification.

*****

(e) Special provisions for stations licensed under this part that are classified as CMRS providers under Part 20 of this chapter.

(1) Station identification will not be required for 929-930 MHz nationwide paging licensees and MTA-based SMR licensees. All other CMRS stations will be required to comply with the station identification requirements of paragraphs (a) through (d) of this section.

(2) CMRS stations subject to a station identification requirement will be permitted to use a single call sign for commonly owned facilities that are operated as part of a single system. The call sign must be transmitted each hour within five minutes of the hour, or upon completion of the first transmission after the hour.

(3) CMRS stations granted exclusive channels may transmit their call signs digitally. The station licensee must provide the Commission with information sufficient to decode the digital transmission to ascertain the transmitted call sign.

29. Section 90.437 is amended by revising paragraphs (b) and (c) to read as follows:

§ 90.437 Posting station licenses.

*****

(b) Entities authorized under this part must make available either a clearly legible photocopy of the authorization for each base or fixed station at a fixed location at every control point of the station or an address or location where the current authorization may be found.

(c) Entities operating under a temporary permit authorized in accordance with § 90.159 shall post an executed copy of the Form 572 at every control point of the system or an address or location where the current executed copy may be found.

*****

30. Section 90.449 is revised to read as follows:

§ 90.449 Answers to official communications and notices of violation.

(a) Licensees are required to respond to official communications with reasonable dispatch and according to the tenor of the communication. Failure to do so may be considered by the Commission to reflect adversely on a person's qualifications to hold Commission authorizations and may also create liabilities for other sanctions.

(b) Any licensee receiving official notice of a violation of the terms of the Communications Act of 1934, as amended, any legislative act or treaty to which the United States is a party, or the rules and regulations of the Commission, shall, within ten (10) days from such receipt or such other period as may be specified by the Commission, send a written answer to the office of the Commission originating the original notice. If an answer cannot be sent, or an acknowledgement made, within such period, acknowledgement and answer shall be made at the earliest practicable date with a satisfactory explanation of the delay. The answer to each notice shall be complete in itself and shall not be abbreviated by reference to other communications or answers to other notices. The reply shall set forth the steps taken to prevent a recurrence of improper operation.

31. Section 90.476 is amended by adding paragraph (c) to read as follows:

§ 90.476 Interconnection of fixed stations and certain mobile stations.

*****

(c) The provisions of this section do not apply to commercial mobile radio service providers, as defined in Part 20 of this chapter.

32. Section 90.483 is amended by revising the introductory paragraph to read as follows:

§ 90.483 Permissible methods and requirements of interconnecting private and public systems of communications.

Interconnection may be accomplished by commercial mobile service providers licensed under this part by any technically feasible means. Interconnection may be accomplished by private mobile service providers either manually or automatically

under the supervision and control of a transmitter control operator at a fixed position in the authorized system of communications or it may be accomplished under the supervision and control of mobile operators, and is subject to the following provisions:

*****

33. Section 90.494 is amended by revising paragraph (c) to read as follows:

§ 90.494 One-way paging operations in the 929-930 MHz band.

*****

(c) All frequencies listed in this section may be used to provide one-way paging communications to persons eligible for licensing under Subpart B, C, D, or E of this part, representatives of Federal Government agencies, individuals, and foreign governments and their representatives. The provisions of § 90.173(b) apply to all frequencies listed in this section.

*****

34. Section 90.603 is amended by revising paragraph (c) to read as follows:

§ 90.603 Eligibility.

*****

(c) Any person, except wireline telephone common carriers, eligible under this part and proposing to provide on a commercial basis base station and ancillary facilities as a Specialized Mobile Radio System operator, for the use of individuals, Federal Government agencies, foreign governments and their representatives, and persons eligible for licensing under subparts B, C, D, or E of this part.

35. Section 90.607 is amended by revising the introductory text of paragraphs (b) and (c) to read as follows:

§ 90.607 Supplemental information to be furnished by applicants for facilities under this subpart.

*****

(b) Except for applicants for SMR licenses, all applicants for conventional radio systems must:

* * * * *

(c) Except for applicants for SMR licenses, all applicants for trunked systems must:

* * *

36. Section 90.623 is amended by revising the introductory text of paragraph (c) to read as follows:

§ 90.623 Limitations on the number of frequencies assignable for conventional systems.

*****

(c) No non-SMR licensee will be authorized an additional frequency pair for a conventional system within 64 kilometers (40 miles) of an existing conventional system, except where:

* * *

*****

37. Section 90.627 is amended by revising the introductory text of paragraph (b), removing "; or," and adding in its place "." at the end of paragraph (b)(2) and removing paragraph (b)(3) to read as follows:

§ 90.627 Limitation on the number of frequency pairs that may be assignable for trunked systems and on the number of trunked systems.

*****

(b) No non-SMR licensee will be authorized an additional trunked system within 64 kilometers (40 miles) of an existing trunked system, except where:

*****

38. Section 90. 631 is amended by revising the first sentence of paragraph (a), and revising paragraphs (b) and (c) to read as follows:

§ 90.631 Trunked systems loading, construction, and authorization requirements.

(a) Non-SMR trunked systems will be authorized on the basis of a loading criteria of one hundred (100) mobile stations per channel. * * *

(b) Each applicant for a non-SMR trunked system must certify that a minimum of seventy (70) mobiles for each channel authorized will be placed into operation within five (5) years of the initial license grant. Except for SMR systems licensed in the 806-821/851-866 MHz band and as indicated in paragraph (i) of this section, if at the end of five (5) years a trunked system is not loaded to the prescribed levels and all channels in the licensee's category are assigned in the system's geographic area, authorizations for trunked channels not loaded to seventy (70) mobile stations cancels automatically at a rate that allows the licensee to retain one channel for every one hundred (100) mobiles loaded, plus one additional channel. If a trunked system has channels from more than one category, General Category channels are the first channels considered to cancel automatically. All non-SMR licensees initially authorized before June 1, 1993, that are within their original license term, or SMR licensees that are within the term of a two-year authorization granted in accordance with paragraph (i) of this section, are subject to this condition. A licensee that has authorized channels cancelled due to failure to meet the above loading requirements will not be authorized additional channels to expand that same system for a period of six (6) months from the date of cancellation.

(c) Except for SMR applicants and as provided in paragraph (d) of this section, an applicant seeking to expand a trunked system by requesting additional channels from the Commission, or through intercategory sharing, or through an assignment, must have a loading level of seventy (70) mobiles per channel on the existing system that is the subject of the expansion request.

*****

39. Section 90.633 is amended by revising paragraph (a), and the first sentence of paragraph (e) to read as follows:

§ 90.633 Conventional systems loading requirements.

(a) Non-SMR conventional systems of communication will be authorized on the basis of a minimum loading criteria of seventy (70) mobile stations for each channel authorized.

*****

(e) A non-SMR licensee may apply for additional frequency pairs if its authorized conventional channel(s) is loaded to seventy (70) mobiles. * * *

*****

40. Section 90.645 is amended by revising paragraph (c) to read as follows:

§ 90.645 Permissible operations.

*****

(c) Except for licensees classified as CMRS providers under Part 20 of this chapter, only for the transmission of messages or signals permitted in the services in which the participants are eligible.

*****

41. Section 90.703 is amended by revising paragraph (c) to read as follows:

§ 90.703 Eligibility.

*****

(c) Any person, except wire line telephone common carriers, eligible under this part and proposing to provide on a commercial basis base station and ancillary facilities as a Specialized Mobile Radio System operator, for the use of individuals, Federal Government agencies, foreign governments and their representatives, and persons eligible for licensing under subparts B, C, D or E of this part.

42. Section 90.733 is amended by revising paragraph (a)(3) to read as follows:

§ 90.733 Permissible operations.

(a) * * *

(3) Except for licensees classified as CMRS providers under Part 20 of this chapter,

only for the transmission of messages or signals permitted in the services in which the participants are eligible.

*****

APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS

Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 503, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Further Notice of Proposed Rule Making* in GN Docket No. 93-252. Written comments on the IRFA were requested. The Commission's final regulatory flexibility analysis for this Third Report and Order in GN Docket No. 93-252 is as follows:

A. Need for and Purpose of Rules

1. This rule making proceeding was initiated to implement Sections 3(n) and 332 of the Communications Act of 1934, as amended. The policies adopted herein will carry out Congressional intent to establish a consistent regulatory framework for all commercial mobile radio service (CMRS) providers. Specifically, this Order ensures that CMRS providers who compete with one another will be subject to comparable technical, operational, and licensing rules.

B. Issues Raised by the Public in Response to the Initial Analysis

2. No comments were submitted specifically in response to the Initial Regulatory Flexibility Analysis.

C. Significant Alternatives Considered

3. The *Further Notice of Proposed Rule Making* in this proceeding offered numerous proposals. The commenters supported the major tenets of the proposed changes, and some commenters suggested changes to some of the Commission's proposals. The regulatory burdens we have retained for all CMRS licensees, including small entities, are necessary to carry out our duties under the Communications Act of 1934, as amended. For example, we have extended Section 309 notice and comment procedures to all CMRS applicants. We also minimized regulatory burdens, where possible, for all CMRS licensees. For example, we adopt a unitary application form for all mobile services applicants and eliminate most end user eligibility requirements and restrictions on permissible uses of CMRS systems. In addition, our proposal to impose a cap on the amount of CMRS spectrum that licensees may aggregate in a given geographic area was discussed by many commenters. We conclude that the spectrum cap as proposed should not be adopted but, rather, that a more specific cap on aggregation of PCS, cellular and SMR spectrum should be adopted. A copy of the Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

APPENDIX D

LIST OF PLEADINGS IN GN DOCKET No. 93-252

COMMENTS

Air Spectrum III, Inc. (ASI)
AirTouch Communications (AirTouch)
AirTouch Paging And Arch Communications Group, Inc. (APACG)
American Mobile Satellite Corporation (AMSC)
American Mobile Telecommunications Association, Inc. (AMTA)
American Personal Communications (APC)
American Petroleum Institute (API)
Bell Atlantic Companies (Bell Atlantic)
BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corp., BellSouth Wireless, Inc., Mobile Communications Corp. of America (BellSouth)
Brown and Schwaninger, Jr. (Brown)
Cellular Telecommunications Industry Association (CTIA)
Celpage, Inc. (Celpage)
Century Cellunet, Inc. (Century)
Comcast Corp. (Comcast)
Committee for Effective Cellular Rules (CECR)
Constellation Communications, Inc. (Constellation)
Dial Page, Inc. (Dial Page)
E.F. Johnson Company (E.F. Johnson)
The Ericsson Corporation (Ericsson)
Geotek Communications, Inc. (Geotek)
Global Cellular Communications, Inc., and Jean M. Warren (Global)
GTE Service Corporation (GTE)
Industrial Telecommunications Association, Inc. and Council of Independent Communication Suppliers (ITA/CICS)
LegalCom Services, Inc. (LegalCom)
Loral/Qualcomm Partnership, L.P. (LQP)
McCaw Cellular Communications, Inc. (McCaw)
Metrocall, Inc. (Metrocall)
Motorola, Inc. (Motorola)
National Association of Business and Educational Radio, Inc. (NABER)
Network USA (Network)
Nextel Communications, Inc. (Nextel)
New Par (New Par)
NYNEX Corporation (NYNEX)
Omnipoint Communications, Inc. (Omnipoint)
OneComm Corporation (OneComm)
Pagemart, Inc. (Pagemart)

Paging Network, Inc. (PageNet)
PCC Management Corporation (PCC)
Personal Communications Industry Association (PCIA)
Pittencrieff Communications, Inc. (Pittencrieff)
RAM Mobile Data USA Limited Partnership (RMD)
RAM Technologies, Inc. (RAM Tech)
The RF Technologies Group, Police Emergency Radio Services, Inc. (RF Tech)
Roseville Telephone Company (Roseville)
Rural Cellular Association (Rural Cellular)
Russ Miller Rental (RMR)
SEA, Inc. (SEA)
Simrom, Inc. (Simrom)
SmartLink Development Limited Partnership (SmartLink)
SMR Systems, Inc. (SMR Systems)
The Southern Company (Southern)
Southwestern Bell Corporation (Southwestern Bell)
Sprint Corporation (Sprint)
SunCom Mobile and Data, Inc. (SunCom)
TRW Inc. (TRW)
United States Sugar Corporation (US Sugar)
US MobilComm, Inc. (USM)
US West, Inc. (US West)
Utilities Telecommunications Council (UTC)
Vanguard Cellular Systems, Inc. (Vanguard)
WJG Maritel Corporation (WJG)

REPLY COMMENTS

American Paging, Inc. (AmP)
American Radio, Professional Communications, Mobile Phones of Cordele/Net Link Communications, Range Telecommunications, Leischner Electric, Southern Minnesota Communications, B & M Communications, Le FLore Communications, Advanced Communications Services, Inc., Mobile Phone of Texas, Communications Works (American Radio)
AMTA
APACG
API
Applied Technology Group, Inc. (ATG)
Atlantic Cellular Company (Atlantic Cellular)
Banks Tower Communications Ltd. (Banks Tower)
Bell Atlantic
Carver, August Bert t/a Action Radio (Action)
CellCall, Inc. (CellCall)

Comcast
Comsat Mobile Communications (Comsat)
Cook, Don (Cook)
Dial Page
Dru Jenkinson, Inc., Tad Dobbs, Inc., Shelly Curttright, Inc., Jana Green, Inc., Joan Moore, Inc. (SMR Applicants)
Eden Communications, Inc. (Eden)
E.F. Johnson
Ericsson
Fetterman, Robert d/b/a RF Communications (Fetterman)
Fresno Mobile Radio, Inc. (Fresno)
Geotek
Global
Industrial Telecommunications Association, Inc., Alliance of Private 800/900 MHz Licensees (ITA/Alliance)
JMTV, Inc., Jean D. Murphy (JMTV)
Joriga Electronics, Inc. (Joriga)
Kay, James A., Jr. (Kay)
Lausman, Kevin d/b/a Communications Service Center (Lausman)
Luczak, Thomas (Luczak)
Madera Radio Dispatch, Inc. (Madera)
McCaw
Mobile U.H.F., Inc. (Mobile UHF)
Motorola, Inc. (Motorola)
NABER
National Telephone Cooperative Association (NTCA)
Nextel
Northwest Wireless Network, L.L.C. (Northwest)
OneComm
O'Neil TV, Inc., Mary O. McDonnel (O'Neil TV)
Pacific Bell and Nevada Bell (Pacific)
PageNet
PCC
PCIA
Pittencrieff
Puerto Rico Telephone Company (PRTC)
Qualicom Systems, Inc. (QSI)
Radiofone, Inc. (Radiofone)
RF Tech
RMD
RMR
RMTV, Inc., Roy J. Murphy (RMTV)
Rural Cellular
SEA

Sobel, Mark d/b/a Airwave Communications (Airwave)
Southeastern SMR Association, Idaho Communications Limited Partnership, Teton Communications Inc., South Carolina Communications Limited Partnership, Advanced Electronics,East Texas Communications Limited Partnership, John Mitchell Company (Southeastern)
The Southern Company (Southern)
Southwestern Bell
Speed-Net, Parkinson Electronics Company, Bill Wayne d/b/a Mr. Radio, Refiled Communications, Inc. and Dale Walsh d/b/a The Walsh Group (SMR Operators)
Sprint
Spruill, C.T. (Spruill)
Stalvey, Rod d/b/a Stalvey Communications (Stalvey)
Suncom
T&K Communications Systems, Inc. (T&K)
TelSA, Inc. (TelSA)
Triangle Communications, Inc. (Triangle)
Uniden America Corporation (Uniden)
USITV, Inc. and Hunter ITV, Inc. (USITV)
USM
US Sugar
US West

APPENDIX E

LIST OF PLEADINGS IN PR DOCKET No. 93-144

COMMENTS

American Mobile Telecommunications Association, Inc. (AMTA)
Associated Public-Safety Communications Officers, Inc. (APCO)
Bell Atlantic Enterprises International (BAEI)
Council of Independent Communications Suppliers (CICS)
Dial Page, Inc. (Dial Page)
E. F. Johnson Company (E.F. Johnson)
Fleet Call, Inc. (Nextel, due to corporate name change)
GTE Service Corp. (GTE)
National Association of Business and Educational Radio (NABER)
PacTel Paging (PacTel)
PowerSpectrum, Inc. (PowerSpectrum)
Radiofone, Inc. (Radiofone)
Southwestern Bell Corporation (Southwestern Bell)
Utilities Telecommunications Council (UTC)

REPLY COMMENTS

Advanced Mobilecomm, Inc. (AMI)
AMTA
Courtesy Communications, Inc. (Courtesy)
GTE
NABER
Nextel
PacTel
Questar Telecom, Inc. (Questar)
Mitchell E. Shipman (Shipman)
Southern Company (Southern)
Southwestern Bell Corporation (Southwestern Bell)
United States Telephone Association (USTA)
UTC

APPENDIX F

LIST OF PLEADINGS IN PR DOCKET No. 89-553

Notice of Proposed Rule Making

COMMENTS

Accent Radio Service, Inc. (Accent)
Advanced Mobilecomm, Inc. (AMI)
American Petroleum Institute (API)
Central Station Alarm Assoc. and The Alarm Industry Communications Committee (CSAA/AICC)
Dispatch Communications, Inc. (Discom)
E.F. Johnson Co. (E.F. Johnson)
Millicom Radio Telephone Company, Inc. (Millicom)
Motorola, Inc. (Motorola)
National Association of Business and Educational Radio, Inc. (NABER)
RAM Mobile Data, Inc. (RAM)
Special Industrial Radio Service Association, Inc. (SIRSA)
SMR Network Association, Inc. (SMR Network)
Telephone and Data Systems, Inc. (TDS)
Utilities Telecommunications Council (UTC)

REPLY COMMENTS

Ad Hoc Committee of Specialized Mobile Radio Operators (Ad Hoc Committee)
AMI
American SMR Network Association, Inc. (ASNA)
API
Fleet Call, Inc. (Fleet Call)
Millicom
Motorola
NABER
National Telephone Cooperative Association (NTCA)
RAM
SIRSA
United Parcel Service, Inc. (UPS)
United States Telephone Association (USTA)
UTC

COMMENTS

AACS Communications, et al. (AACS)
American Mobile Telecommunications Association (AMTA)
Comvest International Corp. (Comvest)
Council of Independent Communication Suppliers (CICS)
Domencich Communications Corp., et al. (Domencich)
E.F. Johnson Co. (E.F. Johnson)
Fleet Call, Inc. (Fleet Call)
Industrial Telecommunications Association, Inc. (ITA)
MTel Technologies, Inc. (MTel)
National Association of Business and Educational Radio, Inc. (NABER)
Power Spectrum, Inc. (Power Spectrum)
RAM Mobile Data USA, L.P. (RAM)
Roamer One, Inc. (Roamer One)
Southern California Edison Co. (SoCal. Edison)
Time Warner Telecommunications (Time Warner)
Utilities Telecommunications Council (UTC)

REPLY COMMENTS

AACS
AMTA
Domencich
Power Spectrum
Radiofone, Inc. (Radiofone)
RAM
SoCal. Edison
Time Warner

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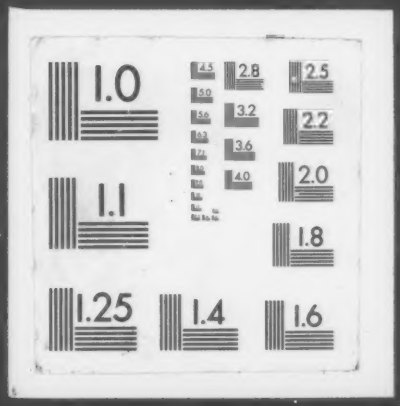
For microfiche users, the index and/or contents is contained on a separate fiche.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